FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

PETER TAVOULAREAS,

Petitioner,

v.

BANQUE NATIONAL DE PARIS
and LOCABAIL (UK) LIMITED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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156 pp

QUESTION PRESENTED FOR REVIEW

(1) Whether the District Court departed so far from the accepted and usual course of judicial proceedings, by dismissing Petitioner's fraud count, without providing Petitioner notice that the issue of *forum non conveniens* would be raised and decided with finality at the only hearing before the court, without taking any evidence to aid in the court's *forum non conveniens* analysis and without conducting the proper analysis as mandated by precedent, and whether the Circuit Court sanctioned the lower court's departure, such that the supervisory power of this court is implicated.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS

The orders entered by both the District Court and the Circuit Court were unpublished.

STATEMENT OF JURISDICTION

The Circuit Court issued an opinion affirming the District Court's opinion on October 31, 2001. Petitioner's Motion for a Panel Rehearing was denied on December 18, 2001. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

PROCEDURAL HISTORY

PETER TAVOULAREAS (hereinafter "Petitioner") filed a Complaint for declaratory relief against BANQUE NATIONAL DE PARIS (hereinafter "BNP") and LOCABAIL (UK) LIMITED (hereinafter "LOCABAIL") in the Circuit Court of the 15th Judicial circuit in and for Palm Beach County, Florida. The Complaint sought a declaration from the Court as to whether a judgment obtained in London, England against Petitioner for the attorneys' fees and costs incurred in an action to which he was not a party was enforceable against him in Florida. App., *infra* 128. The Complaint was removed by Defendants on the basis of diversity jurisdiction, 28 U.S.C. § 1332. App., *infra* 125.

Thereafter, both BNP and LOCABAIL moved to dismiss the Complaint or alternatively for entry of Summary Judgment. App., *infra* 85, 101. BNP asserted various grounds for dismissal including that BNP was not an appropriate party to the lawsuit because the foreign judgment entered against Petitioner was not a Judgment in BNP's favor but, rather, in favor of its subsidiary, LOCABAIL. LOCABAIL raised similar issues and further asserted that the Court lacked personal jurisdiction over LOCABAIL and that the process was insufficient.

While the Motions to Dismiss were pending Petitioner, in an abundance of caution, filed a Verified Motion and Incorporated Memorandum of Law for Leave to File Verified Amended Complaint to include a second count for Fraud. App., *infra* 78. BNP and LOCABAIL responded to the Motion for Leave to File an Amended Complaint objecting to the filing of an Amended Complaint while, at the same time, acknowledging that leave from the Court was not even needed because BNP and LOCABAIL had not yet answered the Complaint, but, rather, had only filed Motions to Dismiss. LOCABAIL and BNP further asserted in their Responses to the Motion to Amend that the amendment would be futile. App., *infra* 62, 67.

Thereafter, Petitioner actually filed the Amended Complaint which he was permitted to do without leave of Court given that no Answers had yet been filed in response to the original Complaint. App., *infra* 51. The Amended Complaint added a count for Fraud against both BNP and LOCABAIL. Petitioner alleged in the Fraud count that LOCABAIL and BNP's predecessor, Paribas, had defrauded Petitioner out of several million dollars by conspiring with Petitioner's

prior partner, Ares Emmanuel, to allow Atlas (TAVOULAREAS' shipping company) guarantees to be placed on several vessels in favor of LOCABAIL without Petitioner's knowledge; agreeing to cap the guarantees at $2,750,000.00; and then calling the guarantees while at the same time secretly agreeing to redeliver the vessels to Ares Emmanuel at a price well below market value. App., *infra* 51 . These fraudulent acts were discovered by Petitioner many years later during a trial between LOCABAIL and Petitioner's ex-wife. App., *infra* 51. Petitioner's damages as a result of the fraud are well in excess of $4,000,000.00.

Neither BNP nor LOCABAIL filed a response of any kind to the Amended Complaint. They both filed Motions for Extension of Time which were granted. App., *infra* 39, 45, 15.

On September 7, 2000, the District Court, *sua sponte*, entered a Notice of Hearing on Defendants' Motions to Dismiss or Alternatively for Summary Judgement as to the original Complaint, scheduling the Motions to be heard on September 25, 2000. App., *infra* 84. The Notice of Hearing stated, in pertinent part, "[t]he defendants' motions to dismiss or alternatively for summary judgment will be heard at that time." App., *infra* 84. Thereafter, on September 22, 2000, the District Court entered an Order granting a continuance of the hearing on the Motions to Dismiss or alternatively for Summary Judgment. App., *infra* 18.

On November 16, 2000, the District Court entered another Notice of Hearing, this time setting for hearing on December 7, 2000, Plaintiff's Motion for Leave to File Amended Complaint. App., *infra* 36. Specifically, the Notice of Hearing provided, in pertinent part:

> Plaintiff's motion for leave to file amended complaint will be heard at that time. Defendants argue that the Court should deny this motion because an amendment would be futile and would not cure the deficiencies in Plaintiff's Complaint that Defendants previously addressed in their motions to dismiss or alternatively for summary judgment. Therefore, the Court will hear argument on Defendants' contentions that there is no actual controversy, BNP's assertion that it is not a proper party, and Locabail's assertions that this Court lacks personal jurisdiction over Locabail, that process was insufficient and that service of process was insufficient. App., *infra* 36.

Due to an unexpected emergency, the hearing was not held on December 7, 2000, and was moved to December 13, 2000.[1] Thereafter, the Court entered a Notice of Continuance of the hearing, rescheduling it for January 4, 2001. App., *infra* 34. The Notice of continuance does not specify what Motions or issues will be heard. App., *infra* 34. Accordingly, Petitioner anticipated that the issues raised in the Notice of Hearing for December 7, 2000, would be the issues argued at the January 4, 2001.

At the January 4, 2001 hearing, the matters raised in the Defendants' Motions to Dismiss were heard, including personal jurisdiction, absence of a bona fide

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[1] No formal notice was issued by the Court or by a party rescheduling the hearing initially set for December 7, 2000 and rescheduled for December 13, 2000.

dispute justifying declaratory relief, insufficiency of process, lack of subject matter jurisdiction, and whether BNP was an improper party. App., *infra* 36. Additionally, the Court apparently also *sua sponte*, and without any prior notice to Petitioner, considered the issue of *forum non conveniens*. App., *infra* 26 at 28-33. The Court inquired during the hearing where the fraud occurred and what law would apply. App., *infra* 26 at 28. The Court was advised by undersigned counsel that the fraud occurred in various places as the money loaned came out of Bermuda, the decisions regarding the calling of the guarantees, etc. were made in Paris, and Petitioner was traveling between London and Florida during the relevant time frame. App., *infra* 26 at 31-32. Additionally, the court was advised that the majority of the relevant documents were already in Florida. App., *infra* 26 at 30-31. The Court took no testimony and had before it no record evidence regarding the specific location of witnesses, the specific location of relevant documents, nor the availability of an appropriate forum equal to that of the United States District Court for the Southern District of Florida.

Nevertheless, the District Court entered an Order which closed the case dismissing the Fraud count of the Amended Complaint on the basis of *forum non conveniens*. The Order further granted the Defendants' Motions to Dismiss and denied the Motion for Leave to File an Amended Complaint as moot.[2] App., *infra* 3.

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[2] Respondents have, throughout the course of this appeal, attempted to confuse the issues by representing that Petitioner continues to pursue the declaratory judgment action. As Respondents are well aware, the judgment which gave rise to the declaratory action has been satisfied. Petitioner is not appealing the dismissal of the count for declaratory relief.

At the Circuit Court, Petitioner contended the dismissal of the Fraud count was an abuse of discretion because the District Court failed to provide Petitioner any notice that the issue of *forum non conveniens* would be addressed, failed to specifically articulate the existence of an adequate, alternative forum, failed to give deference to Petitioner's choice of forum, and failed to take evidence and to properly weigh the public and private interest factors necessary to a *forum non conveniens* determination.

The Circuit Court affirmed the order of the District Court in a cursory order that simply restated without question the conclusions of the District Court finding that the "bulk of relevant witnesses appear to be located in the United Kingdom" and that Respondents conduct the "bulk of their operations overseas." App., *infra* 1. Based on that "review", the Circuit Court affirmed the dismissal upon *forum non conveniens* grounds.

Petitioner filed a Petition for Rehearing, which was denied by the Circuit Court. App., *infra* 23. This Petition followed.

ARGUMENT

The District Court so far departed from established and usual course of proceedings related to the determination of *forum non conveniens* in this case so as to call for this Court's supervisory power. Although district courts are generally vested with discretion in the application of the doctrine of *forum non conveniens*, that discretion cannot be exercised by blatantly disregarding procedural fairness and the controlling authority established by this Court in Gulf Oil Corp. v.

Gilbert, 330 U.S. 501 (1947). Gulf Oil, and the procedures it established for a *forum non conveniens* analysis, have been in place for fifty-five years. The decisions of the lower courts in this case turn a blind eye toward Gulf Oil.

Gulf Oil establishes a process for district courts to decline exercising jurisdiction over a properly-filed case in the presence of "exceptional circumstances." Id. at 540. In addition, Gulf Oil sets forth that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id. at 508. See also Eastman Kodak Co. v. Kavlin, 978 F.Supp. 1078, 1083 (S.D.Fla. 1997) (Ryskamp, J.) (stating "Plaintiffs' choice of forum is entitled to a strong presumption of suitability, and defendants must bear the burden of overcoming that presumption by establishing every element necessary to demonstrate *forum non conveniens*."). Subsequent precedent from this Court establishes that, in making a determination regarding the issue of *forum non conveniens*, "great deference" should be given to a plaintiff who brings an action in his or her home forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981) (citing to and upholding the Gulf Oil analysis). Also paramount is that "[e]ach case turns on its facts." Id. at 249 (citing Williams v. Green Bay & Western R. Co., 326 U.S. 549, 557 (1946)).

I. THE DISTRICT COURT FAILED TO PROVIDE FUNDAMENTAL PROCEDURAL FAIRNESS TO PETITIONER

The District Court failed to provide Petitioner even the most basic procedural requisites prior to and at the hearing on January 4, 2001. The Court failed to provide Petitioner any notice that the issue of *forum non conveniens* would be raised, much less decided with finality at the January 4, 2001 hearing. Neither the Defendants nor the Court raised the issue of *forum non conveniens* vis-à-vis the Fraud count prior to the January 4, 2001 hearing. By failing to provide any notice whatsoever that the issue of *forum non conveniens* would be addressed at the January 4, 2001 hearing, the District Court prevented Petitioner from submitting any facts to establish the convenience of his chosen forum or the inconvenience of an alternative forum.

Given that "each case turns on its facts," as this Court noted in Piper Aircraft, 326 U.S. at 557, the District Court in this case erred fundamentally, and so far departed from the established and usual course of proceedings regarding *forum non conveniens*, by failing to allow Plaintiff to prepare and place facts into the record upon which the district court might render an informed decision. Instead, the lower court *sua sponte* raised the issue (and even then not directly, App., *infra* 26 at 28) without any notice to Petitioner, and then decided the issue with nothing but the argument of counsel to consider as "facts" before rendering its vacuous decision.

Without adequate facts in the form of testimony or affidavit, or otherwise, the District Court somehow divined that "most witnesses are in Europe or the

United Kingdom, including those essential witnesses associated with Locabail." App., *infra* 3 at 19. Other than the Court's assumption as to the location of witnesses for Locabail, and to their "essential" nature, it appears that the District Court's finding as to the location of witnesses is based on nothing more than pure conjecture. If indeed, the facts of each case are critical to a *forum non conveniens* analysis, then the District Court's analysis based on facts which it either presumed or simply conjured, falls well short of the established and usual course of proceedings, as established by this Court, for a *forum non conveniens* analysis.

Even though the District Court failed to take any "facts" into consideration in its *forum non conveniens* analysis, the statements of counsel that were taken into account by the court revealed that no single forum existed that was any more convenient than the Plaintiff's choice of forum. Locobail is located in London; BNP is located in Paris; the Plaintiff is in Florida. App., *infra* 26 at 28-30. The fraud occurred at various locations throughout Europe; the moneys came out of Bermuda; the majority of the documents necessary to prove the fraud claim were in the possession of the Plaintiff in Florida. App., *infra* 26 at 28-30. No single forum comes forward as being more or less convenient for the parties, and the District Court therefore erred in failing to abide by the dictates of Gulf Oil that a Plaintiff's choice of forum should be disturbed only in rare and "exceptional" circumstances. Gulf Oil, 330 U.S. at 540.

No exceptional circumstances are present on this record. Indeed, because of the District Court's absolute failure to take any evidence whatsoever prior to

rendering its decision as to *forum non conveniens*, there are no facts on this record whatsoever upon which the lower court based its decision.

II. THE DISTRICT COURT FAILED TO SPECIFY AN ADEQUATE ALTERNATIVE FORUM

"At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." Piper Aircraft, 454 U.S. at 255 n.22. Generally, an alternative forum is provided if a defendant is amenable to process in the other jurisdiction and the forum permits litigation of the subject matter of the dispute. Piper Aircraft, 454 U.S. at 255 n.22. Furthermore, it is the defendant's burden to establish the existence of the alternative adequate forum. Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (stating "[a] defendant has the burden of persuasion as to all elements of a *forum non conveniens* motion, including the burden of demonstrating that an adequate alternative forum is available"); Bank of Credit and Commerce Int'l (Overseas), Ltd. v. State Bank of Pakistan, 273 F.3d 241, 248 (2d Cir. 2001); Cheng v. Boeing Co., 708 F.2d 1406, 1411 (9th Cir. 1983). The District Court in this case, however, failed to take any evidence, or analyze in any meaningful way, whether an adequate alternative forum existed. The District Court failed to determine whether the Respondents would be amenable to process in the various fora where the fraud is alleged to have occurred. Moreover, the Respondents offered no such evidence other than self-serving argument of counsel.

From the divergent fora revealed through the representations of counsel for Petitioner as to the locations of witnesses, documents and actions supporting the fraud claim, the District Court somehow derived that "an alternative forum is presented by the courts of these nations." App., *infra* 2 at 9. The District Court conducted no analysis of the adequacy of the courts of the nations it referenced. The grounds for the District Court's conclusion are entirely unclear. No evidence whatsoever was taken; no hearing, with prior notice that *forum non conveniens* would be an issue, was held. In addition, the Court failed to take any evidence or conduct any real analysis into whether any of the fora of "these nations" would permit litigation of the Fraud claim.

Clearly, by failing to determine whether an adequate forum existed, the District Court departed so far from the established and usual course of proceedings with respect to the issue of *forum non conveniens*. See Bank of Credit and Commerce Int'l, 273 F.3d at 246; Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (stating "[c]ourts have been strict about requiring that defendants demonstrate that the alternative forum offers at least some relief"); McLennan v. American Eurocopter Corp., Inc., 245 F.3d 403, 424 (5th Cir. 2001); Iragorri v. International Elevator, Inc., 203 F.3d 8, 12 (1st Cir. 2000); Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 605-06 (10th Cir. 1998); Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 802-03 (7th Cir. 1997). Therefore, this Court's supervisory power should be exercised to remedy the error committed by the District Court and compounded by the Circuit Court.

III. THE DISTRICT COURT FAILED TO WEIGH THE RELEVANT PUBLIC AND PRIVATE INTEREST FACTORS NECESSARY TO A *FORUM NON CONVENIENS* DETERMINATION

In order to dismiss a claim on the basis of *forum non conveniens* the court must weigh the public and private interest factors and determine that such factors weigh in favor of dismissal. Gulf Oil, 330 U.S. at 508-09. The trial judge must consider all relevant factors of private and public interest, weighing in the balance a strong presumption against disturbing Petitioner's initial forum choice. Piper Aircraft, 454 U.S. at 256 n. 23.; Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (stating that although private factors are more important, both public and private factors must be considered in a *forum non conveniens* analysis). The trial judge must ensure that the plaintiff can reinstate his action in the alternative forum without undue inconvenience or hardship. C.A. La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983), citing Pain v. United States Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980).

The private factors include, but are not limited to, relative ease of access to sources of proof, ability to obtain witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." See,e.g. Gulf Oil, 330 U.S. at 508.

Public factors include, but are not limited to, the forum's interest in entertaining the lawsuit, court congestion and jury duty generated by controversies having no relation to the forum, the desirability of having localized conflicts decided at home, and

the difficulties attendant in resolving conflicts of laws problems and applying foreign law. Id. at 508-509.

The District Court did not properly weigh these various factors, nor did it even have the evidence before it to do so. The Court merely stated that "most witnesses are in Europe or the United Kingdom", that "Locabail would be extremely disadvantaged since it operates its business in London," that there are additional concerns regarding the "enforcement of a judgment" and the "ease of access to records maintained by BNP and Locabail." App. , *infra* 3 at 19. These conclusory statements, based upon assumptions, guesswork and conjecture, do not demonstrate an adequate balancing of the relevant factors.

"Where the court does not weigh the relative advantages of the respective forums [sic] but considers only the disadvantages of one, it has abused its discretion." C.A. La Seguridad, 707 F.2d at 1308. The same conclusions drawn by the District Court were set forth in the Circuit Court's Order affirming the dismissal, but the record does not sufficiently support such conclusions. Moreover, had Petitioner been permitted to provide evidence against dismissal on the basis of *forum non conveniens*, it would have been clear that the District Court's conclusions and the Circuit Court's regurgitation of those conclusions regarding location of witnesses, burdens, etc., were incorrect.

For example, Petitioner would have shown that LOCABAIL no longer operates any business out of London and that the enforcability of any judgment would be simple given that BNP does substantial business and holds substantial assets in Florida. Additionally, contrary to the Circuit Court's conclusion

that "the bulk of the witnesses appear to be in the United Kingdom", Petitioner would have shown that the only witness with respect to the fraud count that resides in the United Kingdom is a potential rebuttal witness, Barbara Emmanuel. As stated at the hearing, the primary witnesses reside in France, Greece, Bermuda, and the United States. Additionally, Petitioner would have shown that there is no equal and alternative forum available to him. In order to litigate in England, as a foreigner, he would have been required to post a prohibitive cost bond, thus making such forum unacceptable. Furthermore, Petitioner does not speak French or have any other connection to France other than having vacationed there. Nor does Petitioner have any familiarity with or access to the courts of Greece or Bermuda. In short, Florida is the only forum where both Petitioner and Respondents have interests. For these reasons, the District Court's dismissal should have been reversed.

Moreover, the pleadings were not even in such a posture as to allow the District Court to properly balance the *forum non conveniens* factors. Respondents had not even filed Answers to the Amended Complaint setting forth their denials and defenses. See, C.A. La Seguridad, 707 F.2d at 1309 (noting that where the defendant could not establish what facts will be relevant to the defense of the action and, thus, where such facts can be found, it was inappropriate to dismiss on the basis of *forum non conveniens*).

Accordingly, because the District Court failed to properly balance the necessary factors regarding *forum non conveniens*, its dismissal of Petitioner' claim on the grounds of *forum non conveniens* should have been reversed by the Circuit Court.

CONCLUSION

Respectfully, PETER TAVOULAREAS contends that the District Court's dismissal of TAVOULAREAS' Amended Complaint on the basis of *forum non conveniens*, and the Circuit Court's casual affirmance thereof, so far departed from the accepted and usual course of judicial proceedings regarding *forum non conveniens* that the supervisory powers of this Court should be invoked, the decision of the District Court reversed, and the case remanded to the District Court to conduct an appropriate *forum non conveniens* analysis.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10878
Non-Argument Calendar

D. C. Docket No. 00-08461-CV-KLR

PETER TAVOULAREAS,
Plaintiff - Appellant,

versus

BANQUE NATIONALE DE PARIS,
LOCABAIL (UK) LIMITED,
Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 31, 2001)
[Entered: October 31, 2001]

Before CARNES, MARCUS and WILSON,
Circuit Judges.

PER CURIAM:

Appellant Peter Tavoulareas appeals the district court's dismissal of his action for fraud on the basis of the doctrine of *forum non conveniens*.

We review a dismissal based on *forum non conveniens* for abuse of discretion, affording the district court "substantial deference." *Leon v. Million Air Inc.*, 251 F.3d 1305, 1310 (11th Cir. 2001) (internal citation omitted). After carefully reviewing the briefs and the record, we find that the district court did not abuse its discretion in dismissing Appellant's action. Appellant has admitted that the alleged fraud took place in England and several European countries. The bulk of relevant witnesses appear to be located in the United Kingdom. The Appellees conduct the bulk of their operations overseas, and litigating the case here would cause them substantial hardship. Indeed, the only connection between the Appellant's allegations of fraud and the Southern District of Florida appears to be that Appellant resides there and would like to litigate his claim there. In such a circumstance, it is not an abuse of discretion for the district court to dismiss a case on the ground of *forum non conveniens*.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-8461-CIV-RYSKAMP/VITUNAC

PETER TAVOULAREAS,
Plaintiff,

vs.

BANQUE NATIONALE DE PARIS
and LOCABAIL (UK) LIMITED,
Defendants.

[Entered: January 17, 2001]

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS COMPLAINT

THIS CAUSE came before the Court upon Defendant Locabail (UK) Limited's ("Locabail") and Defendant Banque Nationale de Paris's ("BNP") Motions to Dismiss Complaint or, in the Alternative, for Summary Judgment. [DE 9, 10] Plaintiff Peter Tavoulareas ("Tavoulareas") has responded and Defendants have replied. These motions are ripe for review.

I. BACKGROUND

After Defendant Locabail brought a lawsuit against Plaintiff's ex-wife in London, England to foreclose on her home, Plaintiff helped pay the legal fees associated with the litigation. (Am. Compl. ¶¶7-10). After Locabail prevailed, the High Court of Justice, Chancery Division in London, England, ordered Plaintiff's ex-wife on December 20, 1999 to pay Locabail's attorney's fees and costs.[1] (Am. Compl. ¶¶ 9-11.). Plaintiff brought this declaratory judgment action against Defendants Locabail and Banque Nationale de Paris ("BNP") in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Florida, seeking a determination that the order entered by the High Court of Justice, Chancery Division in London, England, on December 20, 1999 is not enforceable against him. (Am. Compl. ¶¶ 14-15.). Defendant Locabail removed the case to this Court based on diversity jurisdiction.

On June 22, 2000, Defendants Locabail and BNP filed separate Motions to Dismiss, or in the Alternative, for Summary Judgment. On September 12, 2000, Plaintiff filed a motion for leave to file an amended complaint, seeking to add a count alleging

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[1] While Defendant Locabail obtained an order from the London court that Plaintiff shall pay their attorney's fees and costs, the costs are not enumerated in the order, which is attached to the Complaint as Exhibit B, and the order includes no judgment for a particular money amount. Therefore, Locabail does not have a judgment that a U.S. Court could enforce. Furthermore, Locabail has argued that a cost judgment must be entered upon notice and hearing, and, therefore, that the London court's order is not enforceable because there has been no hearing.

fraud.[2] Defendants responded that this motion should be denied, because even if the complaint were amended, it would still fail to properly allege jurisdiction.[3] While the amendment to the complaint is allowed as a matter of course, Defendants' arguments in their motions to dismiss are nonetheless applicable to the amended complaint, as are arguments made at the hearing that took place January 5, 2000.

Defendants assert that Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

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2 Count II of Plaintiff's Amended Complaint alleges that, unbeknownst to Plaintiff, his former partner in the Atlas shipping company, Ares Emmanuel, allowed Atlas guarantees to be placed on four vessels in favor of Locabail and two other banks. (Am. Compl. ¶ 22.). Plaintiff alleges that Locabail committed various frauds upon him (as Atlas), which he discovered only during the litigation between Locabail and Plaintiff's ex-wife. (Am. Compl. ¶ 24.). Plaintiff claims that Paribas, the predecessor of BNP, was intimately involved this conduct. (Am. Compl. ¶ 30.).

3 Plaintiff has argued that his motion to amend may be moot because no responsive pleading has yet been filed, and therefore, Plaintiff has an absolute right to amend his complaint. Federal Rule of Civil Procedure 15(a) states that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading has been served. Fed. R. Civ. P. 15(a). A motion to dismiss is not a responsive pleading, and the filing of such motion does not prevent the plaintiff from subsequently amending his complaint without leave of the court. *See* 6 Wright & Miller, Federal Practice & Procedure, § 1483, at 584-85 (2d ed. 1990). Defendants have filed motions to dismiss or for summary judgment, but have not filed answers to the complaint. Therefore, Plaintiff's motion for leave to file amended complaint is indeed moot and the amendment to the complaint will be allowed as a matter of course.

II. DISCUSSION

A. Count 1 - Declaratory Judgment

1. Cause or Controversy Requirement

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part: "In a case of *actual controversy* within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . ." 28 U.S.C. § 2201 (emphasis added). In language similar to its definition of a "controversy" under Article III, the Supreme Court has articulated the test for an "actual controversy" under the Declaratory Judgment Act as follows: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512 (1941). The distinction between such an "actual controversy" and an abstract question is "necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Id. see also Mobil Oil Corp. v. Oil, Chemical & Atomic Workers Int'l Union*, 483 F.2d 603, 607 (5th Cir. 1973) (noting that the determination whether an "actual controversy" is presented must be made on a case-by-case basis). The court must not make a declaration that would constitute an impermissible

"opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S. Ct. 461, 464 (1937).

In *Hendrix v. Pooani*, 662 F.2d 719 (11th Cir. 1981), the appellants sought a declaration that if they denied the appellee doctor's readmission application, they would be protected from liability if the appellee subsequently brought an antitrust action based on this denial. *See id.* at 722. The Eleventh Circuit noted that "[t]he hypothetical nature of the dilemma alleged by the appellants is made clear by the fact that if [the appellee's] readmission application is approved (and we must assume that it might be), the potential for further antitrust litigation against the appellants no longer will exist." *Id.* The court concluded that the declaratory judgment action did not present a live controversy, but rather an abstract question 'based upon the possibility of a factual situation that may never develop[,]'" *id.* (citing *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967)), and stated that the declaration sought would constitute an impermissible "opinion advising what the law would be upon a hypothetical state of facts." *Id.* (citing *Haworth*, 300 U.S. at 241, 57 S. Ct. at 464). The court further noted that there "[can] be no judicial determination that a valid defense exist[s] to a non-existent cause of action." *Id.*

Similarly, in the present case, Plaintiff's complaint presents a hypothetical controversy. As noted above, while Defendant Locabail obtained an order from the London court that Plaintiff shall pay their attorneys' fees and costs, the order includes no enumeration of the costs nor a judgment for a particular money amount. Therefore, at present,

Locabail does not have a judgment that a U.S. court could enforce. Furthermore, Locabail has argued that a cost judgment must be entered upon notice and hearing, and, therefore, that the London court's order is not enforceable because there has been no hearing. Even assuming, as Plaintiff asserts, that the order is enforceable and that Locabail has clearly expressed its intention to enforce a cost judgment against Plaintiff, the potential harm of which Plaintiff complains will still be based on a hypothetical contingency, namely, that Locabail will seek to enforce the judgment against Plaintiff in Florida and not elsewhere. A declaration that a potential cost judgment arising from the London court's December 20, 1999 order is not enforceable against Plaintiff would constitute an impermissible advisory opinion based on a hypothetical factual situation, and therefore, Count I of Plaintiff's complaint should be dismissed.

2. Discretion of the District Court

Even if it could be argued that the threat of the judgment being enforced in Florida is palpable and not merely hypothetical, the Court should not exercise its discretion to grant a declaratory judgment. The Supreme Court has stated that "[s]ince its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286, 115 S. Ct. 2137, 2142 (1995). There is "nothing automatic or obligatory about the assumption of 'jurisdiction' by a federal court to hear a declaratory judgment action. . . . [The Declaratory Judgment Act]

create[s] an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 288, 115 S. Ct. at 2143 (internal quotations omitted).

In addition to the lack of a controversy described above, the fact that Locabail must bring suit to enforce the London cost judgment in state court, a more appropriate forum, and the fact that Plaintiff attempts to anticipate defenses that would be asserted in this potential lawsuit weigh in favor of dismissal of Plaintiff's declaratory judgment claim.

Addressing a similar situation, the Supreme Court has stated that

> [w]here the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is a federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.

Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 248, 73 S. Ct. 236, 242 (1952).

In *Great Lakes Dredge and Dock Co. v. Ebanks*, 870 F. Supp. 1112 (S.D. Ga. 1994), the court listed four factors which the district court may apply to determine if it should exercise its discretion to decline jurisdiction:

> (1) whether there is a pending state court proceeding in which the matters in controversy between the parties may be fully litigated, (2) whether the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, (3) whether there are possible inequities in permitting the plaintiff to gain precedence in time and forum, or (4) whether there is inconvenience to the parties or the witnesses.

Id. at 1117.

While the first and third factors are not implicated in the present case, Plaintiff has filed in anticipation of a state court action by Defendant Locabail to enforce the cost judgment. Plaintiff seeks a declaration that the cost judgment is "repugnant to Florida law and violates Florida's public policy[,]" (Am. Compl. ¶ 14), a claim that clearly would otherwise be raised as a defense in a state court proceeding to enforce the cost judgment. With respect to Defendant Locabail, the fourth factor cited by the *Great Lakes* court is also applicable. Locabail asserts that it is "at a tremendous disadvantage, and faces considerable inconvenience, burden and expense to defend the declaratory judgment action filed by the Plaintiff since it operates its business in London, England." (Def. Locabail's Mot. To Dismiss at 11.)

Therefore, considering the above-mentioned factors weighing in favor of a decision to decline jurisdiction, the Court has concluded that it should exercise its discretion to decline to hear the declaratory judgment action.

B. Count II - Fraud

Defendants have raised the issue of lack of personal jurisdiction. Assuming, *arguendo*, that this Court has personal and subject matter jurisdiction and that venue is proper, Plaintiff's complaint should still be dismissed based on the doctrine of forum non conveniens.

"The principal of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statue." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 842 1947). The district court has discretion in determining whether the forum non conveniens doctrine should be applied. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 951 (11th Cir. 1997). "To dismiss on the basis of forum non conveniens, a court must find that an adequate alternative forum is available, and that relevant private and public interest factors weigh in favor of dismissal." *Trujillo v. Banco Central del Ecuador*, 35 F. Supp. 2d 905, 911 (S.D. Fla. 1998) citing *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996)). Private interest factors include

> the relative case of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Gulf Oil, 330 U.S. at 508, 67 S. Ct. at 843. Public interest factors include "[a]dministrative difficulties" which result "when litigation is piled up in congested centers instead of being handled at its origin[;]" the burden of jury duty that is imposed on a community unrelated to the litigation; the difficulties of the district court in "untangl[ing] problems . . . in law foreign to itself[;]" and the "local interest in having localized controversies decided at home[.]" *Id.* at 508-509, 67 S. Ct. at 843. However, the Supreme Court has also instructed that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508, 67 S. Ct. at 843. In short, "[d]ismissal on forum non conveniens grounds is within the district court's range of discretion when trial in plaintiff's chosen forum would impose a heavy burden on the defendant or the court and an adequate alternative forum is available." *Magnum v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996).

In *Magnin*, the Eleventh Circuit found that the district court did not abuse its discretion in dismissing, on basis of forum non conveniens, an action against a U.S. engine manufacturer and an Alabama citizen who issued airworthiness certificate for airplane which was exported to France and later crashed there. *See id.* at 1426-27. The court noted that France was available as alternative forum and that trying the case in Alabama would impose heavy burdens on the defendants and the local district court, since most witnesses were in France, were presumably French-speaking, and would not be subject to compulsory process, since the aircraft wreckage was in France, and since the parties had agreed that French substantive law applied. *See id.* at 1429-30.

In the present case, Plaintiff has acknowledged that the alleged fraud took place in one or several European countries or the United Kingdom. Therefore, an alternative forum is presented by the courts of these nations. Furthermore, it appears that most witnesses are in Europe or the United Kingdom, including those essential witnesses associated with Locabail. Indeed, as noted above, Locabail has asserted that it is extremely disadvantaged since it operates its business in London. Additional concerns include problems of enforcing a judgment if one is obtained and ease of access to the records maintained by BNP and Locabail. The private and public factors outlined by the *Gulf Oil* Court clearly weigh in favor of dismissing the fraud count. Therefore, this Court must conclude that this action for fraud should be dismissed on forum non conveniens grounds.

III. CONCLUSION

Having considered the motion and the pertinent parts of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

Defendants Locabail and BNP's Motions to Dismiss Complaint are GRANTED. [DE 9, 10] Plaintiff's motion for leave to file amended complaint is DENIED AS MOOT. [DE 26]

The Clerk of the Court shall CLOSE this case and DENY all pending motions as MOOT.

DONE AND SO ORDERED in Chambers in West Palm Beach, this 17 day of January, 2001.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Allan R. Kelley, Esq.
S. Joanne Greer, Esq.
John W. Little, Esq.
Rachelle R. McBride, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

1736.09

[ENTERED: OCTOBER 31, 2000]

Case No. 00-8461-CIV-RYSKAMP/Vitunac

PETER TAVOULAREAS,

Plaintiff,

Vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.

_____/

ORDER GRANTING DEFENDANT BNP'S MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO THE AMENDED COMPLAINT

THIS CAUSE is before the Court upon Defendant Banque Nationale De Paris' ("BNP") Motion for Enlargement of Time to Respond to Plaintiff's Amended Complaint Pending Disposition of Motions. [DE 41] The Court has considered the matters raised therein, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is GRANTED. [DE 41] Defendant BNP shall serve its response, if necessary, within fourteen (14) days

following the Court's ruling on BNP's pending Motion to Dismiss and Alternative Motion for Summary Judgment and Plaintiff's Motions for Leave to Amend and for Leave to File Additional Documents which are presently pending before this Court. DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 31 day of Oct., 2000.

/s/Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Conformed copies furnished to:

John W. Little, III., P.A.
Nikki B. Lewis, Esquire
Steel Hector & Davis LLP
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401

Joanne Greer, Esquire
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Rachelle R. McBride, Esq.
Peter S. Sachs, Esq.
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Boca Raton, Florida 33481-0037

UNITED STATES DISTRICT COURT
Southern District of Florida

NOTICE: Only the WPB Division is completely noticing via FaxBack, you must continue to provide envelopes for all other matters before this Court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

Case No. 008461 CIV-RYSKAMP

ORDER
Granted ☒ Denied ☐
Comments: Granted. Hearing will be reset by separate notice.
James C. Paine for
KENNETH L. RYSKAMP
U.S. District Judge
9-22-00

PETER TAVOULAREAS

Plaintiff,

v.

BANQUE NATIONALE DE PARIS and LOCABAIL (UK) LIMITED,

Defendants.

[Entered: September 22, 2000]

MOTION TO CONTINUE HEARING ON DEFENDANTS' MOTIONS TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, PETER TAVOULAREAS (hereinafter "TAVOULAREAS"), hereby, through counsel, and files this Motion to Continue Hearing on Defendants' Motions to Dismiss or Alternatively for Summary Judgment scheduled for September 25, 2000 at 9:00 a.m., and as grounds therefore states as follows:

1. Defendants, BANQUE NATIONALE DE PARIS (hereinafter "BNP") and LOCABAIL (UK) LIMITED, (hereinafter "LOCABAIL") filed Motions to

Dismiss or Alternatively for Summary Judgment. These motions have been sui sponte noticed for hearing by this Honorable Court for September 25, 2000 at 9:00 a.m.

2. TAVOULAREAS respectfully requests that this Honorable Court continue the hearing on Defendants' motions because such hearing is premature and would not facilitate complete and accurate resolution of the issues between the parties in this matter.

3. TAVOULAREAS' original Complaint in this matter is for declaratory relief, seeking a declaration from this Court that a foreign judgment obtained by LOCABAIL against

* * *

copies provided:
Rachelle McBride, Esq.
Allan R. Kelley, Esq.
S. Joanne Greer, Esq.
John W. Little, III, Esq.

UNITED STATES DISTRICT COURT
Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

Case No. 008461 CIV-RYSKAMP

PETER TAVOULAREAS

Plaintiff,

v.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION TO CONTINUE HEARING ON DEFENDANTS' MOTIONS TO DISMISS OR ALTERNATELY FOR SUMMARY JUDGMENT

THIS CAUSE having come before this Court upon Plaintiff's Motion to Continue Hearing on Defendants' Motions to Dismiss or Alternatively for Summary Judgment, and this Court, having reviewed the file and having been otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion to Continue Hearing on Defendants' Motions to Dismiss or Alternatively for Summary Judgment is

_____

_____

DONE AND ORDERED in Chambers at 701 Clematis Street, Room 416, West Palm Beach, Florida 33401-5112, this _____ day of September 2000.

_____
Honorable Kenneth K. Ryskamp

Copies furnished:

RACHELLE R. MCBRIDE, ESQ. , Sachs, Sax & Klein, P.A., 301 Yamato Road, Suite 4150, Boca Raton, FL 33481

ALLAN R. KELLEY, ESQ., Fowler, White, Burnett, Hurley, Banick & Stickroot, P.A.
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BOCA RATON, FL 33481-0037
TELEPHONE (561) 994-4499 •
TELECOPIER (561) 994-4985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10878-FF

PETER TAVOULAREAS,
Plaintiff - Appellant,

versus

BANQUE NATIONALE DE PARIS,
LOCABAIL (UK) LIMITED,
Defendants - Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

[Entered: December 18, 2001]

BEFORE: CARNES, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.
ENTERED FOR THE COURT:

\s_____
UNITED STATES CIRCUIT JUDGE

Rachelle R. McBride
SACHS, SAX & KLEIN, P.A.
301 Yamato Road - Suite 4150
Boca Raton FL 33431

December 18, 2001

RE: 01-10878-FF Peter Tavoulareas v. Banque National De Paris
DC DKT NO.: 000-8461 CV-KLR

CC: Rachelle R. McBride
CC: Spencer Meredith Sax
CC: John W. Little, III
CC: Allan Richard Kelley
CC: Peter S. Sachs
CC: Sara Joanne Greer
CC: Administrative File

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Names of Parties

December 18, 2001

MEMORANDUM TO COUNSEL OR PARTIES

RE: 01-10878-FF Peter Tavoulareas v. Banque National De Paris
DC DKT NO.: 00-08461 CV-KLR

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Carol Lewis/ar (404) 335-6175

Encl.

REHG-1 (1-1999)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 00-8461-CIV-KLR
WEST PALM BEACH, FLORIDA

PETER TAVOULAREAS, .
.
PLAINTIFF, . **January 4, 2001**
v. . **1:30 PM**
.
BANQUE NATIONALE, et al., .
.
DEFENDANTS. .

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS HAD
BEFORE THE HONORABLE KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFF: RACHELLE R. McBRIDE, ESQ.

FOR THE DEFENDANTS: J.B. MURRAY, ESQ.,
NATALIE LEWIS, ESQ.
JOANN GREER, ESQ.

COURT REPORTER: CRISS D. BERTLING, RPM-CM
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
701 CLEMANTIS STREET, # 416
WEST PALM BEACH, FLORIDA 33401
PHONE (561) 651-3865

(PROCEEDINGS RECORDED AND TRANSCRIBED VIA C.A.T.)

Thursday, January 4, 2001 1:30 PM

THE COURT: You may be seated. Good afternoon. Counsel state their appearances, please.

MS. McBRIDE: Your Honor, for plaintiff, Rachelle McBride. I have here the plaintiff Mr. Tavoulareas.

MS. GREER: Your Honor, for the defendant, Joann Greer on behalf of Locobail (UK).

MR. MURRAY: J.B. Murray on behalf of Banque Nationale; this is my colleague Natalie Lewis.

THE COURT: All right, we have a number of motions. I believe it started with motions to dismiss by the two defendants or in the alternative, Motion for Summary Judgment. And the plaintiff has moved to file an Amended Complaint. And I think there's a motion to strike certain things. So let me hear from the defendants first. I have read the pleadings.

MS. GREER: Your Honor, Joann Greer on behalf of Locobail Limited. I believe we do have a pending motion to strike the Plaintiff's Supplemental Response in Opposition to the Defendant's Motions to Dismiss or Alternatively for Summary Judgment.

That motion is based on the failure of the plaintiff to comply with the Court's Order with respect to filing additional affidavit. The original motion for leave to file additional documents referred to an affidavit.

* * *

should certainly be denied. And that everything that has been submitted should be considered with respect to these Motions to Dismiss or Alternatively for Summary Judgment.

Your Honor, first with regard to, and also I know we're dealing with our Motion to Amend the Complaint, so it's all kind of convoluted. But I think probably the best way to deal with that is to kind of at least go through the history of how this came about, your Honor.

Mr. Tavoulareas was involved in a company known as Atlas in Europe. It was a shipping company. He did own a hundred percent of Atlas. At one point in time his previous partner, Mr. Emmanuel, who is also now the ex-husband of Barbara Emmanuel, who was involved in the underlying litigation with Locobail, caused loans to be given by Locobail and guarantees to be placed, Atlas guarantees and several million dollars to be placed on various ships. Mr. Emmanuel did this without the authority of Tavoulareas and did this with Locobail knowing that he had no authority to do this.

Thereafter, Locobail and Emmanuel, this is alleged in our proposed Amended Complaint, conspired to defraud Mr. Tavoulareas. And what they did - -

THE COURT: Where did this conspiracy arise, what country?

MS. McBRIDE: Well, Mr. Tavoulareas was in Florida when this happened.

THE COURT: Did he just happen to be vacationing here?

MS. McBRIDE: No, he lived here and had lived here for , on and off for several decades.

Excuse me.

(PAUSE)

MS. McBRIDE: Your Honor, during this period of time, although Mr. Tavoulareas had a residence here, he was throughout Europe. These deals took place throughout Greece, Libya, various different places. The fraud itself, your Honor, was the conspiracy to call the guarantees, the Atlas guarantees in excess of several million dollars, while still knowing that Locobail intended to redeliver these ships back to Mr. Emmanuel.

So Mr. Tavoulareas came out of his pocket, paid the $2 million - -

THE COURT: But this all happened in Europe, right, the activities of the banks?

MS. McBRIDE: The actual fraud, your Honor, did happen in Europe. But there is not a particular place in Europe where this would be any more appropriate than here. And I can explain that.

Because none of these decisions were taken in London. So London is not the appropriate venue. Some of the decisions were taken in Paris. Mr. Tavoulareas has never been to Paris or France, for that matter, other than on holiday.

The funds for these loans and, ultimately, the money that was exchanged via the fraud, came out of Bermuda, which is where the loans for this UFB Locobail came out of. And the moneys that were paid

in the fraud were paid into Pariba's account. So, your Honor, I know what you are getting at, that there may be a more appropriate venue for this. But there is not.

Mr. Tavoulareas has no connections with Paris, which is where some decisions were taken. And all these other decisions and the moneys came from various different sources. That is a global bank that does global transactions.

THE COURT: But all of this pertains only to your Amended Complaint, right? Because you didn't said anything about it in the main Complaint, right?

MS. McBRIDE: Excuse me?

THE COURT: You didn't say anything about this in the main complaint, this is the Amended Complaint which hasn't been approved yet.

Ms. McBride: Correct. I'm trying to give you a history, your Honor, of how this came about.

These loans that had been given to Mr. Emmanuel -

* * *

MS. McBRIDE: That would be an interesting issue, because you have , it has occurred in so many different places.

THE COURT: But it's clear that U.S. law would not apply, right?

MS. McBRIDE: Probably not, your Honor. Probably not. It would probably be, we would have to track it back to see exactly where the different things occurred and which thing, where the most of the

events occurred to determine exactly which substantive law would apply to that fraud.

But we believe, your Honor, that would be fraud, most likely, under any country's choice of law.

Defrauding creditors, obtaining $2 million, fraudulently returning the vessels back to the person who defaulted on the loans. All of that, we can't see how that could not be fraud regardless of what law is applied.

I'd be happy to track everything through and brief for your Honor, if you are interested, exactly what we believe the choice of law would be there. But we recognize that it probably would not be the United States law as far as the actual fraud transaction.

THE COURT: Who would the witnesses be to such a transaction? They would all be in Europe too?

MS. McBRIDE: The witnesses are all over the place your Honor. There is no great venue for this lawsuit. Mr. Tavoulareas is here. Mr. Emmanuel is in Greece. Mr. Walker, who is one of the main perpetrators of the fraud, I believe is in Paris.

There are various individuals who are in London. The parent bank Paribas now BNP has offices in Paris. The moneys came out of Bermuda. There's a lot of different places where these individuals would be.

THE COURT: Where is all the evidence, like the documents, they are all in Europe too, right?

MS. McBRIDE: Mr. Tavoulareas has most of the documents that support the fraud, many of which have been submitted to your Honor. Those merely

need to be certified as authentic. Which will not be difficult. Much of it is testimony from the trial between Barbara Emmanuel and Locobail. So it is sworn testimony under oath. A lot of the other items are public documents, such as the court returns and that type of thing.

Mr. Tavoulareas can certainly substantiate the moneys that were paid and trace those back. There is not a lot of documents that are not already in our possession to support this fraud claim.

So it would not be a matter of gathering documents from around the entire world. There certainly is going to be some foreign depositions and that type of thing. But that would not change even if the venue changed, because there's not one locale that is where everything took place. It's just not that simple. It didn't happen that way.

So we believe this venue is as appropriate a venue as anyplace else. This is where Mr. Tavoulareas lived, this is where he's a resident, and has been for a long time. And he has connections here. Whereas in the other places there's no absolute connection for any of the entities or any of the people.

Your Honor, Locobail has argued that there is no jurisdiction over Locobail. In order for there to be jurisdiction, we have alleged allegations in the Complaint which are sufficient for jurisdiction. One, we have alleged that Locobail and BNP are so interrelated that they are, in effect, one company. That they are alteregos of each other. That is a sufficient allegation for jurisdiction, given that BNP has a registered agent here, that does reside in Florida - -

THE COURT: Assuming it's sufficient for the Complaint, they refuted it by affidavits of people to the contrary.

MS. McBRIDE: They submitted an affidavit of Mr. Fitzpatrick initially. We responded to that affidavit. They then submitted another affidavit of Mr. Fitzpatrick.

* * *

Locobail. That's different. We're not talking about apples and apples here. We're talking about apples and oranges. Plaintiff is trying to create a relationship that does not exist.

And the allegations of the Complaint are insufficient to demonstrate an alterego on relationship. The allegations of the Complaint do not confer personal jurisdiction. They don't rise to the level of conferring personal jurisdiction or bringing Locobail within the ambit of the Long Arm Statute.

Without more, Locobail is not a proper party to this action. There's no personal jurisdiction by the Court.

THE COURT: All right.

MS. GREER: Thank you, your Honor.

THE COURT: Thank you. I'll take the matter under advisement and let you know in due course. Court will be in recess.

(Recessed at 2: 50 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

[ENTERED: DECEMBER 11, 2000]

Case No. 00-8461-CIV-RYSKAMP/VITUNAC

PETER TAVOULAREAS,
Plaintiff,

Vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.

NOTICE OF CONTINUANCE OF HEARING

THIS CAUSE came before the Court *sua sponte.* PLEASE TAKE NOTICE that the hearing in the above-styled case before the undersigned, United States District Judge Kenneth L. Ryskamp, at the United States Courthouse, Courtroom #1, 701 Clematis Street, West Palm Beach, Florida 33401 set for **Wednesday, December 13, 2000** has been CONTINUED.

PLEASE TAKE NOTICE that this hearing has been rescheduled for **Thursday, January 4, 2001 at 1:30 p.m.** Thirty minutes have been reserved for this hearing.

DONE AND ORDERED in Chambers in West Palm Beach, this 11 day of December, 2000.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Southern District of Florida

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Notice of Orders or Judgments

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

[ENTERED: NOVEMBER 16, 2000]

Case No. 00-8461-CIV-RYSKAMP/VITUNAC

PETER TAVOULAREAS,

Plaintiff,

Vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.

_____/

NOTICE OF HEARING

THIS CAUSE came before the Court *sua sponte.* PLEASE TAKE NOTICE that the hearing in the above-styled case has been set for a hearing before the undersigned, United States District Court Judge Kenneth L. Ryskamp, at the United States Courthouse, Courtroom #1, 701 Clematis Street, West Palm Beach, Florida 33401 on **Thursday, December 7, at 8:30 a.m.** Plaintiff's motion for leave to file amended complaint will be heard at that time. Defendants argue that the Court should deny this motion because an amendment would be futile and would not cure the deficiencies in Plaintiff's complaint that Defendants previously

addressed in their motions to dismiss or for summary judgment. Therefore, the Court will hear argument on Defendants' contentions that there is no actual controversy, BNP's assertion that it is not a proper party, and Locabail's assertions that this Court lacks personal jurisdiction over Locabail, that process was insufficient and that service of Process was insufficient. Thirty minutes have been reserved for this hearing.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 16 day of November, 2000.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Rachelle R. McBride, Esq.
Allan R. Kelley, Esq.
John W. Little, III, Esq.

UNITED STATES DISTRICT COURT
Southern District of Florida

NOTICE: Only the WPB Division is completely noticing via FaxBack, you must continue to provide envelopes for all other matters before this Court.

Notice of Orders of Judgments

Date: 11/16/00

To: Rachelle R. McBride (aty)
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Suite 4150 PO Box 810037
Boca Raton, FL 33481

Re: Case Number: 9:00-cv-08461

Document Number: 49

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

[ENTERED: OCTOBER 30, 2000]

Case No. 00-8461-CIV-RYSKAMP/Vitunac

PETER TAVOULAREAS,

Plaintiff,

vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.

_____/

DEFENDANT BNP'S MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO AMENDED COMPLAINT PENDING DISPOSITION OF MOTIONS

Pursuant to Local Rule 7.1 and Fed. R. Civ. P. 6(b), Defendant Banque Nationale de Paris ("BNP") respectfully requests that the Court grant BNP additional time within which to respond to Plaintiff's Amended Complaint, if necessary, until rulings by the Court on pending motions. The grounds for this motion are set forth below.

Background

1. Plaintiff filed its initial complaint in state court, and the case was subsequently removed to this Court by Co-defendant, Locabail (UK) Limited ("Locabail") in June, 2000.

2. Following removal, BNP responded to the initial complaint with its Motion to Dismiss and Alternative Motion for Summary Judgment, which is fully briefed and pending before the Court. Locabail filed a similar motion, which is also briefed and pending at this time.

3. By Order dated September 7, 2000, this Court *sua sponte* set the motions to dismiss and for summary judgment for hearing on September 25, 2000. That hearing was later postponed upon Plaintiff's motion for continuance.

4. The next day, September 8, 2000, Plaintiff served a Motion for Leave to File Additional Documents in Opposition to Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment on September 12, 2000.

5. In connection with its Reply in support of its Motion for Leave to File Amended Complaint, Plaintiff served BNP with an Amended Complaint on October 13, 2000. In that Reply, Plaintiff requests that the Court "grant his Motion for Leave to File an Amended Complaint, or, alternatively, acknowledge the Amended Complaint filed concurrently herewith." Reply at 6. Because Plaintiff choose to also serve this Amended Complaint, BNP's response to the Amended Complaint would otherwise be due to be served on or before October 30, 2000.

Argument

6. Rule 6(b) of the Federal Rules of Civil Procedure provides that:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the Court for cause shown may at any time in its discretion... order the period enlarged if request therefor is made before the expiration of the period originally prescribed.

By its express terms, the rule affords wide discretion to this Court to enlarge time periods established by the rules or court order. See Woods v. Allied Concord Fin. Corp., 373 F.2d 733 (5th Cir. 1967). Enlargement of time should be available when a party demonstrates a reasonable basis for such a request. See Beaufort Concrete Co. v. Atlantic States Constr. Co., 352 F.2d 460 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

7. Here, there is a reasonable basis for an enlargement of time. A ruling by the Court on BNP's motion could eliminate the need for BNP to respond to Plaintiff's Amended Complaint, or at least narrow the issues to which BNP is required to respond. Likewise, Plaintiff has requested leave of Court to file the Amended Complaint, which motion has not been withdrawn and is pending before the Court. Plaintiff has also requested leave to file additional documents in opposition to Defendants' motions.

8. Counsel for BNP finds itself in something of a procedural paradox. To move forward at this time in response to the Amended Complaint while the prior motions are pending will re-start the motion and briefing process, and may interfere with the Court's intended handling of this matter. On the other hand, the Court may decide that some or all of the pending motions are moot, which could require BNP to respond. Accordingly, in order to effect the most judicious expenditure of the Court's and parties' resources, BNP seeks an enlargement of time pending the Court's ruling on these motions.

9. Plaintiff will not be prejudiced by this request for an enlargement of time to respond to the Amended Complaint, if necessary, following the Court's ruling on the earlier filed motions. Pursuant to Local Rule 7.1 undersigned counsel has attempted to contact Plaintiff's counsel with respect to this request for enlargement, but has been unsuccessful as of the service of this motion.

10. This enlargement of time is sought in good faith and not for the purpose of delay.

WHEREFORE, Banque Nationale de Paris respectfully requests an enlargement of time to serve its response to the Amended Complaint, if necessary, until fourteen (14) days after the Court rules on BNP's Motion to Dismiss or Alternative Motion for Summary Judgment and the Plaintiff's Motions for Leave to Amend and for Leave to File Additional Documents which are presently pending before the Court. Alternatively, BNP requests a fourteen (14) day enlargement of time from the Court's ruling on this motion, within which to serve its response to the Amended Complaint.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
1900 Phillips Point West
777 S. Flagler Drive
West Palm Beach, FL 33401-6198
Tel: 561.650.7200; Fax: 561.655.1509

By:/s/John W. Little, III
John W. Little, III, P.A.
Florida Bar No. 384798
Nikki B.Lewis
Florida Bar No. 181536
Attorneys for Defendant
Banque Nationale de Paris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Enlargement of Time to Respond to Plaintiff's Amended Complaint Pending Disposition of Motions was served by U.S. mail this 30th day of October, 2000 on:

Rachelle R. McBride, Esq.
Peter S. Sachs, Esq.
Sachs, Sax & Klein, P.A.R.
P.O. Box 810037
Boca Raton, Florida 33481-0037

Joanne Greer, Esquire
Fowler White Burnett Hurley
Banick & Strickroot
100 S.E. 2nd Street
Miami, FL 33131

By:/s/John W. Little, III
John W. Little, III, P.A.

MIA-1998/627434

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO. 00-8461 CIV-RYSKAMP

PETER TAVOULAREAS,
Plaintiff,

v.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.

DEFENDANT, LOCABAIL (UK) LTD.'S MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO VERIFIED AMENDED COMPLAINT

Defendant, LOCABAIL (UK) LIMITED ("LOCABAIL"), by and through the undersigned counsel, hereby requests an enlargement of time to serve its response to Plaintiff's Verified Amended Complaint pursuant to Federal Rules of Civil Procedure 6(b) and Local Rule 7.1.

1. On or about May 4, 2000, Plaintiff commenced the above-captioned action by filing it in Circuit Court of the 15th Judicial Circuit, In and For Palm Beach County, State of Florida.[1] On the same date, Plaintiff served summonses for both LOCABAIL and co-Defendant Banque Nationale de Paris ("BNP")

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[1] On June 2, 2000, LOCABAIL, pursuant to 28 U.S.C. §§ 1441 and 1446, removed the above-captioned matter to this Court.

on Ramon Hernandez, registered agent for BNP, based on Plaintiff's mistaken belief that Mr. Hernandez is also registered agent for LOCABAIL, a foreign company, established and doing business in the United Kingdom of Great Britain. LOCABAIL is not authorized to and does not conduct business in Florida, nor in the United States of America. LOCABAIL asserts that this service was improper and insufficient, and does not waive or intend to waive any objection to such service of process. Therefore, to date, LOCABAIL has appeared before this Court to contest service of process and personal jurisdiction and has not waived such defense, or any other defenses available to LOCABAIL.

2. LOCABAIL filed a *Motion to Dismiss Plaintiff's Complaint or Alternative Motion for Summary Judgment* which asserts *inter alia* that service of proper was imporper and insufficient and that this Court lacks personal jurisdiction over LOCABAIL. This motion remains pending before this Court. Thereafter, the Plaintiff filed a responsive memorandum of law, and a Notice of Correction to the same. LOCABAIL timely filed a reply memorandum of law. On September 7, 2000, this Court set the defendants' motions to dismiss or alternatively for summary judgment for hearing on Monday, September 25, 2000. This hearing was continued upon Plaintiff's motion, filed on Friday, September 22, 2000.

3. Before the motions had been heard, the Plaintiff filed a *Motion for Leave to File Additional Documents in Opposition to Defendants' Motion to Dismiss,* and a *Verified Motion and Incorporated Memorandum of Law for Leave to File Verified Amended Complaint.* LOCABAIL opposed the motion for leave to

file additional documents and the motion for leave to file the Verified Amended Complaint. The Plaintiff has filed untimely replies to LOCABAIL's responses, which replies LOCABAIL has moved to strike. However, the *Plaintiff's Reply to Defendants' Responses to Plaintiff's Motion for Leave to File an Amended Complaint ("Reply")* states that the "Plaintiff is, concurrently with the filing of this Reply, filing the Amended Complaint". *See Reply*, p. 2.

4. By its actions, the Plaintiff wishes to proceed on the Verified Amended Complaint despite the fact that it has a motion for leave to file an amended complaint still pending before this Court, and therefore does not have leave from the Court to file such an amended pleading. In essence, the Plaintiff wants this Court to skip over the pending motions, and to treat the amended pleading as filed.

5. By its pleadings, the Plaintiff acknowledges the uncertainty of the status of the pleadings. In its prayer for relief in the *Reply*, the Plaintiff seeks an order granting the motion for leave to amend, or alternatively requests the Court to acknowledge the Verified Amended Complaint as having been filed. *See Reply*, p. 6. LOCABAIL suggests that the Plaintiff should be held to the pleadings before this Court and that once a motion for leave to amend has been filed, a party cannot thereafter merely file the amended pleading. Additionally, LOCABAIL has expended attorneys' fees and costs in preparing a response to the Plaintiff's motion for leave to amend, which should be taxed against the Plaintiff in the event that this Court allows the Verified Amended Complaint to stand as filed without consideration of the motion for leave to amend.

6. LOCABAIL is unsure as its obligations with respect to responding to the Plaintiff's Verified Amended Complaint. Indeed, it seems that the parties are in a "twilight zone"\ of pleadings, with numerous motions pending before the Court and no clear direction. Therefore, LOCABAIL requests that this Court grant an enlargement of time for LOCABAIL to respond to the Verified Amended Complaint until after this Court has made a determination on the matters pending before the Court, *i.e.* the motions to dismiss or alternatively for summary judgment, the motion for leave to file additional documents, and, if necessary, the motion for leave to file an amended complaint.

7. LOCABAIL has challenged this Court's jurisdiction over LOCABAIL for several reasons: (1) the Plaintiff has not effected service of process on LOCABAIL; (2) the purported process was insufficient; and (3) the Florida long-arm statute and constitutional due process requirements of minimum contacts of a non-resident defendant will not confer *in personam* jurisdiction over LOCABAIL. These fatal problems cannot be overcome by the Plaintiff in any number of amendments to the pleadings. Therefore, LOCABAIL believes that it will prevail on its motion to dismiss or alternatively for summary judgment. Since amendment would be futile where there can be no personal jurisdiction over LOCABAIL, the time and expense of drafting a response to the Amended Verified Complaint would be unnecessary.

8. This request for an enlargement of time is not made for the purposes of delay. Rather, LOCABAIL seeks to avoid the expense of preparing and filing unnecessary pleadings under the circumstances of this case.

9. Plaintiff will not be prejudiced by an enlargement of time for LOCABAIL to respond to the Verified Amended Complaint if this Court deems such response necessary.

10. Thus, LOCABAIL has established good cause for the granting of this motion.

11. The undersigned counsel has attempted to contact Plaintiff's counsel for her position on this motion for enlargement of time, but Plaintiff's counsel has not responded as of the time of filing this motion.

12. By filing this motion, LOCABAIL does not, and does not intend to, waive any and all defenses available to LOCABAIL, including without limitation such defenses as lack of personal jurisdiction, insufficiency of process, and failure to state a cause of action.

WHEREFORE, LOCABAIL respectfully requests an enlargement of time in which to serve its response to Plaintiff's Verified Amended Complaint upon instruction to do so by this Court.

Respectfully submitted,

/s/ _____

Allan R. Kelley
Fla. Bar No. 309893
S. Joanne Greer
Fla. Bar No. 0063797
FOWLER, WHITE, BURNETT, HURLEY,
BANICK & STRICKROOT, P.A.
100 Southeast Second Street, 17th Floor
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201
Counsel for Locabail (UK), Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of October, 2000 to John W. Little, III, Steel Hector & Davis, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6161, counsel for BNP; and Rachelle R. McBride, Esquire, Sachs, Sax & Klein, P.A., Northern Trust Plaza, Suite 4150, 301 Yamato Road, Boca Raton, Florida 33431, counsel for Tavoulareas.

/s/S. Joanne Greer
S. Joanne Greer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO. 00 8461 CIV-RYSKAMP

PETER TAVOULAREAS
Plaintiff,

v.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.
_____/

VERIFIED AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff, PETER TAVOULAREAS (hereinafter "TAVOULAREAS"), hereby, through counsel, and sues Defendants BANQUE NATIONALE DE PARIS (hereinafter "BNP") and LOCABAIL (UK) LIMITED (hereinafter "LOCABAIL"), and alleges as follows:

1. This is an action for Declaratory Relief and for fraud and for damages in excess of $1,000,000.00.

2. Plaintiff, TAVOULAREAS, is a resident of Palm Beach County, Florida and is otherwise *sui juri*.

3. Defendants, BNP and LOCABAIL, are foreign corporations authorized to and doing business in Florida.

4. Defendants are interrelated parent and subsidiary companies with overlapping officers, directors, employees, and business interests, such that they constitute one legal entity. Upon information and belief all conduct of LOCABAIL relevant to this action was authorized, sanctioned, and orchestrated or directed by BNP or BNP's predecessor, Paribas.

5. In 1999, BNP acquired Paribas and all of its subsidiaries including, but not limited to LOCABAIL. Upon acquiring all of the interest of Paribas, BNP assumed both Paribas' assets and liabilities, both liquidated and contingent.

COUNT I - DECLARATORY RELIEF

6. Plaintiff adopts and realleges the allegations contained in Paragraphs 1 - 5 above as if specifically set forth herein.

7. Defendants were involved in litigation in London, England with Plaintiff's ex-wife, Barbara Tavoulareas Emmanuel (hereinafter "the London litigation"). In that litigation the Defendants sought, in addition to other relief, to foreclose on the home in which Plaintiff's ex-wife and Plaintiff's children reside.

8. Plaintiff, TAVOULAREAS, assisted his ex-wife, Barbara Tavoulareas Emmanuel, in paying the legal fees and costs incurred by her in connection with the London litigation.

9. Plaintiff's ex-wife did not prevail in the London litigation. Accordingly, pursuant to English law, she was ordered to pay the opposing parties' (Defendants herein) attorneys' fees and costs.

10. Thereafter, Defendants sought an Order from the English Court that Plaintiff herein also be ordered to pay the attorneys' fees and costs incurred by the Defendants in the London litigation under the theory that Plaintiff herein had "financed" the London litigation for his ex-wife.

11. Plaintiff was advised by Defendants of their intent to seek an Order from the London Court holding him responsible for the attorneys' fees and costs of the London litigation. He was advised by way of correspondence sent by Defendants to his home in Boca Raton, Florida. A true and correct copy of the correspondence is attached hereto as Exhibit "A." Undersigned counsel, on behalf of Plaintiff, advised Defendants' counsel that they had no grounds, jurisdiction or rights to obtain or enforce a judgment against Plaintiff, a Florida resident, for an attorneys' fee and cost judgment in a case to which he was not even a party.

12. Thereafter, Defendants attempted to serve Plaintiff for fees and costs, with process in Florida and went forward with seeking an Order against Plaintiff for fees and costs, and were ultimately successful. A true and correct copy of the Judgment on Costs Application Against Mr. Peter Tavoulareas entered by the London Court (hereinafter "London Cost Judgment") entering judgment against Plaintiff herein for the attorneys' fees and costs incurred by Defendants in connection with the London litigation is attached hereto as Exhibit "B." As with previous correspondence, a copy of the Order was sent by Defendants to Plaintiff in Boca Raton, Florida.

13. Subsequent to the entry of the London Cost Judgment, Defendants have forwarded additional correspondence to Plaintiff in Florida and undersigned counsel on his behalf acknowledging their intent to enforce the Judgment against Plaintiff.

14. The above London Cost Judgment is not enforceable against Plaintiff for the following reasons:

1) the London Court did not have jurisdiction over Plaintiff;

2) the nature of the Judgment, i.e., the taxing of attorneys' fees and costs against a nonparty, is repugnant to Florida law and violates Florida's public policy;

3) the London Court did not even properly follow its own law in entering a judgment against Plaintiff, a nonparty to the litigation, for attorneys' fees and costs;

4) the original Judgment against Plaintiff's ex-wife in the London litigation upon which the Judgment against Plaintiff is based, was obtained through fraud; and

5) it would be inequitable to enforce the London Cost Judgment against Plaintiff.

15. Because Plaintiff does not believe the London Cost Judgment is enforceable against him and because Defendants believe it is enforceable and have expressed their intention to enforce it, there is a bonafide dispute between the parties. Thus, a declaration is needed from this Court as to whether the London Cost Judgment is enforceable against Plaintiff. Such a declaration will have a substantial impact on the parties' duties, rights, credit, and other involvements.

WHEREFORE, Plaintiff, TAVOULAREAS, respectfully requests that this Honorable Court take jurisdiction of the parties and the subject matter of this action; enter a declaratory judgment determining that the London Cost Judgment is not enforceable against Plaintiff; award the costs of this action; and award such other and further ancillary relief this Court deems appropriate.

COUNT II - FRAUD

16. Plaintiff adopts and realleges the allegations contained in Paragraphs 1 - 5 above, as if specifically set forth herein.

17. In 1974, TAVOULAREAS, George Commas and Ares Emmanuel (hereinafter "EMMANUEL") formed a shipping company known as Atlas. The initial contract of Atlas was to manage ships for Saudi Arabian based joint ventures between Saudi interests and Mobil. At this time TAVOULAREAS' father (hereinafter "Tavoulareas, Sr.") was president of Mobil.

18. George Commas left Atlas in 1975. Thereafter, Emmanuel and TAVOULAREAS continued to grow the business. Emmanuel owned 35% of the business and TAVOULAREAS owned 65%.

19. In 1979, the Washington Post published two front page articles criticizing the relationship between TAVOULAREAS and Tavoulareas, Sr. and Atlas and Mobil, citing to nepotism and preferential treatment. The articles resulted in investigations by the S.E.C. and Congress. The investigations confirmed no wrongdoing, and TAVOULAREAS and Tavoulareas, Sr. launched a libel suit against the Washington Post

(hereinafter "the Post suit" or "Post litigation"). The Post suit was all consuming for TAVOULAREAS. TAVOULAREAS was forced to effectively give up the day-to-day operations of Atlas and work full time on the coordination of the legal team and issues in the Post litigation. The litigation created a media frenzy. TAVOULAREAS resided for a great period of time in Florida and New York throughout the Post litigation. The litigation resulted in a judgment in favor of TAVOULAREAS and Tavoulareas, Sr. Ultimately, the judgment was reversed.

20. Within a month of the judgment being rendered in the Post suit, TAVOULAREAS discovered that his wife, Barbara, had left with their children and was seeking a divorce. TAVOULAREAS later discovered that Barbara had been having an affair with TAVOULAREAS' partner, Emmanuel. Later, after the ultimate divorce, Barbara and Ares Emmanuel marry.

21. From the time of the entry of the judgment in the Post suit until at least December of that year, TAVOULAREAS spent much of his time at family residences in Florida which they have had for over 30 years.

22. During the period of time that TAVOULAREAS was involved in the Post suit and recouping thereafter, Emmanuel and others, unbeknownst to TAVOULAREAS, allowed Atlas guarantees to be placed on 4 vessels in favor of LOCABAIL and two other banks. The vessels upon which the guarantees attached ultimately were not profitable.

23. In 1983, after discovering defalcations in the millions of dollars on behalf of Emmanuel, Emmanuel left Atlas. Thereafter, in 1984, after disputes

with others in Atlas, (TAVOULAREAS ultimately gains 100% ownership interest of Atlas). TAVOULAREAS then informs the Emmanuel camp that the Atlas guarantees they placed on the subject vessels should be lifted. He also informs the banks, including LOCABAIL, that while he was willing to negotiate a settlement if the guarantees were lifted, he would counterclaim for negligence and fraud if the guarantees were called as he, the primary shareholder of Atlas, had never authorized the guarantees. In 1985, a principle of LOCABAIL, Robert Walker, proposes to TAVOULAREAS a "cap" if the vessels go into default. The vessels go into default and TAVOULAREAS pays in excess of $2,000,000.00.

24. TAVOULAREAS discovers, only during the LOCABAIL/Barbara Emmanuel litigation, that while he was in the United States managing the Post suit and thereafter, that LOCABAIL committed various frauds upon him (as Atlas).

25. In 1984, LOCABAIL gives LEAR (Lemos, Emmanuel and Arapis) two ships, thereby extending more credit and affecting Atlas guarantees without Atlas' approval. At this time, Paribas/LOCABAIL knew of Emmanuel's involvement and knew that he was no longer with Atlas.

26. Prior to the offer to "cap" or limit the guarantees on the ships, LOCABAIL obtained a valuation of the Hans House (the real property in dispute in the LOCABAIL/Barbara Emmanuel litigation), thus showing that LOCABAIL was well aware that Emmanuel was the true party in interest and was no longer with Atlas.

27. Despite the knowledge that Emmanuel did not have authority to do so, LOCABAIL negotiated with him for several million dollars of loans resulting in unauthorized placement of Atlas guarantees on the vessels.

28. Thereafter, LOCABAIL conspired with Emmanuel to commit fraud upon Atlas, i.e., TAVOULAREAS, by agreeing to call the "cop" guarantees while, at the same time, intending to "rig" the martial sale of the vessels by delivering them back to Emmanuel.

29. Although the martial sale of the ships was open to the public and the ships sold at market value, LOCABAIL defrauded TAVOULAREAS by conspiring with Emmanuel to call the Atlas guarantees and then selling the ships back to Emmanuel at the bank debt, minus the Atlas guarantee (an amount well below market value). They also defrauded Atlas as a general creditor along with many other creditors.

30. Paribas, the predecessor of BNP, was intimately involved in all of the above conduct of LOCABAIL. In fact, Paribas was specifically involved in the plan to call the guarantees and "redeliver" the vessels to Emmanuel at an artificial price and was involved in setting such price.

31. As a result of LOCABAIL's and Paribas' (now BNP) fraudulent conduct, TAVOULAREAS was damaged in the millions of dollars by being forced to pay off guarantees which were fraudulently obtained and called.

WHEREFORE, Plaintiff, PETER TAVOULAREAS, respectfully requests that this Honorable Court enter judgment in his favor for compensatory damages, interest, and the costs of this

action, and such other and further relief this Court deems appropriate, and demands a trial by jury on all issues so triable as of right and reserves the right to later assert a claim for punitive damages upon proper proof.

VERIFICATION

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this Amended Complaint and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

/s/ Peter Tavoulareas
PETER TAVOULAREAS

STATE OF FLORIDA)
) **ss:**
COUNTY OF PALM BEACH)

SWORN TO AND SUBSCRIBED before me this _____ day of September, 2000 by PETER TAVOULAREAS.

_____
Notary Public, State of Florida

My Commission Expires:

_____ Personally Known to Me OR
_____ Produced _____ as identification

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been forwarded via U.S. Mail to ALLAN R. KELLEY, ESQUIRE, Fowler, White, Burnett, Hurley, Banick & Stickroot, P.A., Bank of America Tower, 17th Floor 100 Southeast Second Street Miami, Florida 33131 and JOHN W. LITTLE, III, ESQUIRE, Steel, Hector & Davis, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6161, this ___day of October, 2000.

SACHS, SAX & KLEIN, P.A.
Attorneys for Plaintiff, TAVOULAREAS
P.O. Box 810037
Boca Raton, Florida 33481-0037
Facsimile: (561) 994-4985
(561) 994-4499

By: /s/ Rachelle R. McBride
Rachelle R. McBride
Florida Bar No. 0072801
Peter S. Sachs
Florida Bar No. 149401

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 00-8461-CIV-RYSKAMP/Vitunac

PETER TAVOULAREAS,

Plaintiff,

vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.
_____/

BANQUE NATIONALE DE PARIS'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE VERIFIED AMENDED COMPLAINT

Pursuant to Local Rule 7.1 of the United States District Court for the Southern District of Florida, Defendant, Banque Nationale de Paris ("BNP") hereby responds to Plaintiff's Verified Motion for Leave to File Verified Amended Complaint ("Motion to Amend") as follows.

Memorandum of Law

Plaintiff filed his Complaint on May 4, 2000. BNP responded to the Complaint by filing its Motion to Dismiss, Alternative Motion for Summary Judgment and Supporting Memorandum of Law on June 22, 2000.

Plaintiff opposed BNP's motions with a variety of unsupported allegations, to which BNP subsequently replied. On September 7, 2000, this Court, *sua sponte*, noticed defendants' motions to dismiss or alternatively for summary judgment for hearing on September 25, 2000. One day later, on September 8, 2000, Plaintiff served his Motion to Amend.

While good grounds exist to deny the Motion to Amend, BNP feels compelled to bring an initial procedural point to the Court's attention. Rule 15(a) of the Federal Rules of Civil Procedure provides that "a party may amend the party's pleading once as a matter of course at any time before a *responsive pleading* is served..." (emphasis added). The Rule goes on to state that thereafter, leave of court or consent of the adverse party must be obtained before amendment may occur. Rule 7(a) of the Federal Rules identifies the pleadings permitted in federal court actions. See Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995)

The majority of courts that have addressed this issue have held that a motion to dismiss under Rule 12(b) and a motion for summary judgment are not responsive pleadings as that term is used in Rule 15(a). See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1483. The Eleventh Circuit recognized this rule in its recent decision of Brewer-Giorgio v. Producers Video, Inc., 216 F.3d 1281, 1284 (11th Cir. 2000). Nonetheless, in that case, the Eleventh Circuit affirmed the district court's denial of leave to amend, even as of right, where the amendment would be futile. Id. At 1285. [1]

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1 The Eleventh Circuit did not reach the other grounds relied upon by the district court in denying amendment – undue delay and undue prejudice.

According to the United States Supreme Court, leave to amend should be liberally granted absent the following factors:

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment.

Foman v. Davis. 371 U.S. 178, 182 (1962). See also Galindo v. Ari Mutual Insur. Co., 203 F.2d 771, 777, n.10 (11th Cir. 1996) (court properly denied plaintiff's motions to amend complaints where amendment was futile); Florida Power & Light Co. v. Allis Chalmers Corp., 85 F.3d 1514, 1520 (11th Cir. 1996) (court properly denied motion to amend where amendment would be futile because claim barred regardless of relation back).

Here the amendment is futile because Plaintiff cannot correct the deficiencies in its declaratory relief claim and cannot state a fraud claim against BNP. As demonstrated in its prior filings, BNP is not a proper party to this action and Plaintiff's Amended Complaint does not cure that defect. Likewise, it is apparent that Plaintiff's amendment is purely for tactical reasons in an effort to avoid dismissal by adding a claim other than declaratory relief and attempting to avoid summary judgment by relying on a verified complaint. Among other reasons, because these allegations are not based on personal knowledge, they are insufficient to create any issues of material fact.

Whether the Court decides to address these issues in the context of the Motion to Amend or wait until BNP files its renewed motion to dismiss and alternatively for summary judgment in response to the Amended Complaint, BNP respectfully suggests that the result will be the same. Plaintiff does not have a claim against BNP.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Opposition to Plaintiff's Motion to Amend Complaint was served via U.S. mail this 25th day of September, 2000 on:

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By: _____
John W. Little, III, P.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 00-8461-CIV-RYSKAMP/Vitunac

PETER TAVOULAREAS,
Plaintiff,

vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.

LOCABAIL (UK) LIMITED'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S VERIFIED MOTION FOR LEAVE TO FILE VERIFIED AMENDED COMPLAINT

Defendant, LOCABAIL (UK) LIMITED, by and through its undersigned counsel, makes this limited appearance and files its memorandum of law in opposition to Plaintiff's *Verified Motion and Incorporated Memorandum of Law for Leave to File Verified Amended Complaint* ("Verified Motion").

1. The Plaintiff, PETER TAVOULAREAS ("TAVOULAREAS") filed its original Complaint seeking a declaratory judgment against Defendants LOCABAIL (UK) LIMITED ("LOCABAIL") and BANQUE NATIONALE DE PARIS ("BNP"). Plaintiff seeks a declaration from this Court regarding the enforceability of a foreign judgment obtained by LOCABAIL against TAVOULAREAS in London, England.

2. Thereafter, TAVOULAREAS served a summons and copy of the Complaint on Ramon Hernandez. TAVOULAREAS incorrectly alleged Mr. Hernandez to be a registered agent for BNP *and* for LOCABAIL. Mr. Hernandez is *not* a registered agent for LOCABAIL. [Sworn Statement of Stuart Fitzpatrick, Esq., previously filed with the Court.] Indeed, LOCABAIL is an English company, *not* registered to conduct business in the United States of America, and with *no registered agent* in Florida or any other state in the United States of America. [Sworn Statement of Stuart Fitzpatrick, Esq.] Therefore, service of process on LOCABAIL is invalid, and LOCABAIL has moved to quash the same.

3. Having received a copy of the original Complaint via facsimile from Plaintiff's counsel, LOCABAIL's English counsel requested that the undersigned attorneys remove the action to federal court and move to dismiss the same for insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, and failure to state a claim upon which relief may be granted. LOCABAIL filed its *Motion to Dismiss Plaintiff's Complaint, or Alternative Motion for Summary Judgment* on June 21, 2000.

4. BNP filed a similar motion to dismiss or alternatively for summary judgment based on its complete and utter lack of involvement in the underlying litigation in London, England which gave rise to the foreign judgment TAVOULAREAS now seeks to avoid.

5. On September 7, 2000, this Court *sua sponte* set the motions to dismiss for hearing on Monday, September 25, 2000.

6. TAVOULAREAS subsequently filed the Verified Motion for leave to file a verified amended complaint, presently at issue, followed by a *Motion for Leave to File Additional Documents In Opposition to Defendants' Motion to Dismiss*, and, two (2) days prior to the long-scheduled hearing, a *Motion to Continue Hearing on Defendants' Motions to Dismiss or Alternatively for Summary Judgment*. These pleadings merely serve to delay the inevitable conclusion of this matter, *i.e.* that TAVOULAREAS cannot maintain a cause of action against LOCABAIL. Due to the futility of amending the Complaint in this matter, LOCABAIL respectfully requests that the Verified Motion be denied and TAVOULAREAS not be allowed to waste any more of the Court's time, delay these proceedings any further, and cause the Defendants unnecessarily to expend additional resources.

Memorandum of Law

LOCABAIL recognizes that a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Fed. R. Civ. P. 15(a). Additionally, LOCABAIL is cognizant that its motion to dismiss is not a responsive pleading as contemplated by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 7(a); *see also Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995).

Nevertheless, TAVOULAREAS filed the subject Verified Motion, and has invited a response. LOCABAIL takes this opportunity to object to the Verified Motion.

Futility

Although leave to amend pleadings is to be freely granted, such leave is not automatic. *See* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1487. *See also Harlingen v. City of Dunedin*, 1992 U.S. Dist. LEXIS 4859, 6 Fla. Law W. Fed. D 105, *2 (M.D. Fla. Apr. 8, 1992). It is well-established that a proposed amendment will not be allowed if it is futile, frivolous or advances a claim that is legally insufficient on its face. Wright, Miller & Kane, *supra.*, § 1487; *Messelt v. Security Storage Co.* 11 F.R.D. 342, 344 (D.C. Del. 1951)("an amendment may not be permitted if it is obviously and palpably insufficient as a matter of law"); *Kaplan v. U.S.*, 42 F.R.D.5 (D.C. Cal 1967)(a party moving for leave to amend should present at least a prima facie meritorious claim).

The Eleventh Circuit Court of appeals recently affirmed a district court's denial of leave to amend, even as of right, where amendment would be futile. *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1285 (11th Cir. 2000). The Eleventh Circuit also recognized that amendment may be denied on the grounds of undue delay and undue prejudice to the defendants. *Id., citing Abramson v. Gonzalez*, 949 F.2d 1567, 1581 (11th Cir. 1992).

The United States Supreme Court has identified several factors which will serve to defeat a motion for leave to amend a pleading, specifically

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment.

Foman v. Davis, 371 U.S. 178, 182 (1962); *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.*, 68 F.R.D. 383 (N.D. Ill. 1975). *See also Harlingen*, 1992 U.S. Dist. LEXIS 4859, 6 Fla. Law W. Fed. D 105, *2.

It would be futile to allow TAVOULAREAS to file the proposed Verified Amended Complaint. Where a complaint as amended could not withstand a motion to dismiss, then the amendment should be denied as futile. *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985)("[t]he liberal amendment rules...do not require the courts to indulge in futile gestures"); *DeLoach v. Woodley*, 405 F.2d 496, 496-97 (5th Cir. 1968).

The proposed amended pleading will be unable to withstand a motion to dismiss. It cannot and will not overcome the Plaintiff's failure to serve LOCABAIL. Likewise, the amended pleading cannot and will not confer personal jurisdiction over LOCABAIL. Certainly, the pleading does not comport with the requirements of the Federal Rules of Civil Procedure for pleading special matters. Fed. R. Civ. P. 9(b). Additionally, LOCABAIL questions the timeliness of a fraud count against LOCABAIL, where the allegations of the proposed amended pleading suggest that TAVOULAREAS believed he may have a cause of action for fraud against LOCABAIL in 1984. Due to the futility of amendment, TAVOULAREAS should not be allowed to amend the Complaint as proposed.

Additional Expense and Confusion

Similarly, this Court may deny the motion having determined that the proposed amendment would result in LOCABAIL being put to added expense and the burden of a more complicated and lengthy trial, and that the issues raised in the fraud count are remote from the issues central to the declaratory judgment count and might confuse or mislead the trier of fact. *See* Wright, Miller, & Kane, *supra.* § 1487. *See L.g. Suehle v. Markem Mach. Co.,* 38 F.R.D. 69, 71 (E.D. Pa. 1965).

This proposed amendment is not an alternate theory of recovery on basically the same claim. *Foman, supra.,* 371 U.S. 178. Rather, it is a completely new, separate and distinct theory of recovery, based on an entirely different set of operative facts. *Suehle,* 38 F.R.D. at 71. The proposed Verified Amended Complain with its new fraud count will put LOCABAIL to a substantially increased burden of discovery, preparation, and expense, and thereby prejudice LOCABAIL's right to a speedy and inexpensive resolution of this matter contemplated by the pending Motion to Dismiss on the declaratory judgment count. *Id.*

Even if the Motion to Dismiss fails, and even if TAVOULAREAS is able to establish personal jurisdiction over LOCABAIL (which LOCABAIL is confident TAVOULAREAS cannot), the declaratory judgment cause of action involves purely legal issues, as Plaintiff admits in its Verified Motion. *Verified Motion,* ¶7, n.1. The fraud count would be extraordinarily complex both factually and legally, as can be deduced from the allegations which stretch back

to the early 1970s. It will require extensive global discovery, with countless depositions outside the United States and review of an unimaginable amount of documentation located outside the United States. This will be incredibly expensive and time-consuming, thereby delaying resolution of the declaratory judgment count unnecessarily and to the detriment and prejudice of LOCABAIL. As such, TAVOULAREAS should not be allowed to amend the Complaint to include the fraud count.

Good Faith

The Court may also consider the good faith of the party seeking amendment. Wright, Miller & Kane, *supra.*, § 1487; *Goewey v. U.S.*, 886 F.Supp. 1268 (D.C. S.C. (Charleston) 1995)(plaintiffs had been dilatory in seeking to amend and permitting amendment would have been futile; amended complaint contained rambling, disjointed and unrelated allegations, some of which had no apparent factual or legal foundation and would be subject to dismissal on motion of defendants, and attempt to amend after defendant had filed dispositive motions appeared to be 11th-hour attempt to evade grant of summary judgment by grasping at new legal theories not based on newly discovered evidence or intervening facts).

The proposed Verified Amended Complaint is merely an attempt to bolster the inadequacies in the Plaintiff's opposition to the Motion to Dismiss by submitting an after-the-fact verification of the allegations. Additionally, it comes over four (4) months after the original Complaint was filed, but it is based on alleged occurrences in the 1970s and 1980s,

purportedly discovered in 1984 and then rediscovered some time thereafter. Finally, it was filed one day after this Court set the Defendants' motions to dismiss for hearing.

Leave to amend may be denied if the moving party knew the facts on which the claim sought to be added were based at the time of filing the original pleading, and there is no excuse for failure to plead them. *See Minor v. Northville Public Schools,* 605 F. Supp. 1185, 1201 (D.C. Mich. 1985), *citing* Wright, Miller & Kane; *Ferrell v. Busbee. 91 F.R.D. 225 (D.C. Ga. 1981).* Such is the case presently before the Court and leave to amend should be denied.

Unsupported By Case Law

It should be noted that the cases cited by the Plaintiff in support of its Verified Motion relate to the doctrine of *res judicata* and the proposition adhered to by Florida courts that all relief sought from a single event, transaction or occurrence against a single defendant should be sought and recovered in one action. *Alvarez v. Nestor Salesco, Inc.,* 695 So.2d 941, 942 (Fla. 4th DCA 1997). The proposed Verified Amended Complaint does not seek to assert a second count based on the same event, transaction, or occurrence as the count for declaratory judgment. Therefore, Plaintiff's reliance on the aforementioned case is misplaced.

The Plaintiff cites *Pages v. Dominquez,* 652 So.2d 864, 868 (Fla. 4th DCA 1995) for the proposition that Fla. R. Civ. P. I.270 grants Florida's state courts with broad discretion to consolidate actions involving common questions of law or fact, and that two causes of action involving similar evidence, witness or discovery are

appropriate to be litigated together in the same action. *Pages* involved a petition for writ of certiori upon denial of a motion to consolidate two claims arising out of the same automobile accident pending in different trial courts. *Id.* at 866. The petition was denied by the appellate court for a number of reasons, not least of which was the fact that the two claims encompassed completely separate and distinct causes of action, one for wrongful death and another for personal injury, involving completely separate and distinct damages. *Id.* at 866. Similarly, the two causes of action set forth in the proposed Verified Amended Complaint are completely separate and distinct, seeking completely separate and distinct damages. The Plaintiff has failed to show that amendment of the Complaint would be anything other than highly prejudicial to the Defendants.

Conclusion

Contrary to the Plaintiff's assertions in the Verified Motion and in Plaintiff's motion to continue the hearing on the Defendants' motions to dismiss, LOCABAIL will be prejudiced if Plaintiff is allowed to file its Verified Amended Complaint. This Court may refuse to allow amendment if it would be futile, or subject the non-moving party to substantial additional expense and delay in resolution of the existing dispute, or if the proposed amendment is merely a dilatory tactic on the part of the moving party. LOCABAIL respectfully suggests that amendment would be futile, unnecessarily costly and is not sought in good faith by TAVOULAREAS, and should be denied by this Court.

Respectfully submitted,

/s/ S. Joanne Greer
S. Joanne Greer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 25th day of September, 2000 to John W. Little, III, Steel Hector & Davis, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6161, counsel for Banque Nationale de Paris; and Rachelle R. McBride, Esquire, Sachs, Sax & Klein, P.A., Northern Trust Plaza, Suite 4150 301 Yamato Road, Boca Raton, Florida 33431, counsel for Tavoulareas.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 00 8461 CIV-RYSKAMP

PETER TAVOULAREAS
Plaintiff,

v.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.
_____/

VERIFIED MOTION AND INCORPORATED MEMORANDUM OF LAW FOR LEAVE TO FILE VERIFIED AMENDED COMPLAINT

COMES NOW, Plaintiff, PETER TAVOULAREAS (hereinafter "TAVOULAREAS"), hereby, through counsel, pursuant to S.D. Fla. L.R. 15.1 and the Federal Rules of Civil Procedure, and files this Verified Motion and Incorporated Memorandum of Law for Leave to File Verified Amended Complaint, and as grounds therefore states as follows:

1. The original Complaint filed by Plaintiff asserts a cause of action for declaratory relief, seeking a declaration against Defendants, BANQUE NATIONALE DE PARIS (hereinafter "BNP") and LOCABAIL (UK) LIMITED (hereinafter "LOCABAIL") that a Judgment obtained in London by LOCABAIL against TAVOULAREAS is void and unenforceable by LOCABAIL or BNP in the United States, specifically Florida.

2. The subject foreign Judgment is for the costs and attorneys' fees associated with London litigation between TAVOULAREAS' ex-wife, Ms. Barbara Emmanuel, and LOCABAIL. In short, the litigation involved LOCABAIL's attempts (ultimately successful) to foreclose Ms. Emmanuel's interest in certain real property located in London. Because LOCABAIL prevailed in the litigation with Ms. Emmanuel, pursuant to English law, it was entitled to a judgment against Ms. Emmanuel for its attorneys' fees and costs. Due to the insolvency of Ms. Emmanuel, LOCABAIL also sought, and ultimately obtained, a Judgment against TAVOULAREAS premised upon the theory that he funded the litigation against LOCABAIL on behalf of his ex-wife. Such Judgment is the Judgment that TAVOULAREAS attacks in this action.

3. TAVOULAREAS seeks to amend his Complaint to add an additional cause of action against Defendants, namely a cause of action for fraud.

4. The alleged fraud perpetrated against TAVOULAREAS by Defendant, LOCABAIL, and Defendant, BNP's, predecessor, Paribas, is directly and intricately connected to the litigation between Ms. Emmanuel and LOCABAIL and, thus, connected to this action. But for the original fraud, it is unlikely the circumstances giving rise to the litigation between Ms. Emmanuel and LOCABAIL would have developed. In fact, the alleged fraud was only discovered as a result of the litigation between Ms. Emmanuel and LOCABAIL. The discovery and testimony in that litigation alerted TAVOULAREAS, for the first time, to the fraud.

5. The specifics of the alleged fraudulent conduct are set forth in detail in Count II of the proposed Verified Amended Complaint attached hereto and incorporated herein by reference as Exhibit "A."

6. Respectfully, Plaintiff contends that it should be permitted to file the proposed Verified Amended Complaint attached hereto and incorporated herein, as the allegations contained therein are interrelated to the allegations of the original Complaint and such amendment would facilitate the most prompt and efficient means of resolving all disputes between the parties. The prompt, efficient, and complete resolution of all claims between the parties in one action is encouraged. Alvarez v. Nestor Salesco, Inc., 695 So.2d 941, 942 (Fla. 4th DCA 1997) *citing* Gaynon v. Statum, 10 So.2d 432 (Fla. 1942). The "splitting" of causes of action is discouraged. Id.

7. Additionally, both the claim for declaratory relief and the fraud claim involve similar discovery, witnesses, and evidence.[1] Where two causes of action involve similar evidence, witnesses or discovery, it is appropriate that they be litigated together in the same action. Pages v. Dominguez, 652 So.2d 864, 868 (Fla. 4th DCA 1995) (Rule 1.270 vests the trial court with broad discretion to consolidate actions involving common questions of law or fact).

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[1] It is Plaintiff's position that the declaratory relief claim should be resolved as a matter of law without resort to discovery or evidentiary hearing. However, to the extent that discovery or presentation of evidence is necessary, it is anticipated that there will be significant overlap of same between the two causes of action.

8. Moreover, permitting the requested amendment will not, in any way, result in prejudice to Defendants. The litigation of this action is only in the initial stages. There has been no discovery. Nor have Answers to the original Complaint even been filed. At this time, Defendants' Motions to Dismiss remain pending. If there is no prejudice to the opposing parties, motions to amend the pleadings should be liberally granted. Fla. R. Civ. P. 1.190; Lasar Manufacturing Company, Inc. v. Bachanov, 436 So.2d 236 (Fla. 3d DCA 1983).

WHEREFORE, Plaintiff, PETER TAVOULAREAS, respectfully requests that this Honorable Court grant his Verified Motion for Leave to File Verified Amended Complaint and enter such other and further relief this Court deems appropriate.

VERIFICATION

I understand that I am swearing or affirming under oath to the truthfulness of the claims made in this Motion and that the punishment for knowingly making a false statement includes fines and/or imprisonment.

/s/ Peter Tavoulareas
PETER TAVOULAREAS

STATE OF FLORIDA)
) ss:
COUNTY OF PALM BEACH)

SWORN TO AND SUBSCRIBED before me this _____ day of September, 2000 by PETER TAVOULAREAS.

_____
Notary Public, State of Florida

My Commission Expires:

_____ Personally Known to Me OR

_____ Produced _____ as identification

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been forwarded via U.S. Mail to ALLAN R. KELLEY, ESQUIRE, Fowler, White, Burnett, Hurley, Banick & Stickroot, P.A., Bank of America Tower, 17th Floor 100 Southeast Second Street Miami, Florida 33131 and JOHN W. LITTLE, III, ESQUIRE, Steel, Hector & Davis, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6161, this _____ day of September, 2000.

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By: /s/ Rachelle R. McBride
Rachelle R. McBride
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Peter S. Sachs
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

[ENTERED: September 7, 2000]

Case No. 00-8461-CIV-RYSKAMP/VITUNAC

PETER TAVOULAREAS,
Plaintiff,

vs.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.
_____/

NOTICE OF HEARING

THIS CAUSE came before the Court *sua sponte*. PLEASE TAKE NOTICE that the above-styled case has been set for a hearing before the undersigned, United States District Judge Kenneth L. Ryskamp, at the United States Courthouse, Courtroom #1, 701 Clematis Street, West Palm Beach, Florida 33401 on **Monday, September 25, 2000, at 9:00 a.m.** The defendants' motions to dismiss or alternatively for summary judgment will be heard at that time. Thirty minutes have been reserved for this hearing.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 7th day of September, 2000.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 00-8461-CIV-RYSKAMP/Vitunac

PETER TAVOULAREAS,

Plaintiff,

vs. Calendared for 7/7 Memo

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,

Defendants.
_____/

DEFENDANT BANQUE NATIONALE DE PARIS'S MOTION TO DISMISS, ALTERNATIVE MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

MOTION

Defendant, Banque Nationale de Paris ("BNP"), moves to dismiss Plaintiff's Complaint for Declaratory Relief for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6); Article III, Section 2, Clause 1, of the United States Constitution, and Title 28, Section 2201 of the United States Code. Alternatively, BNP requests that this motion be treated as a motion for summary judgment

pursuant to Federal Rule of Civil Procedure 56 and that the Court grant summary judgment because there are no genuine issues of material fact and BNP is entitled to judgment as a matter of law.

BACKGROUND

Plaintiff, Peter Tavoulareas ("Plaintiff") brought this declaratory judgment action in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Florida against Defendants BNP and Locabail (UK) Limited ("Locabail") seeking a determination that a cost judgment entered by the High Court of Justice, Chancery Division in London, England, on December 20, 1999 is not enforceable against Plaintiff. Complaint at ¶¶ 12-13. Thereafter, Locabail removed this case to federal court based upon diversity jurisdiction.

The Complaint alleges that Locabail brought a lawsuit against the Plaintiff's ex-wife in London, England, to foreclose on a home in which Plaintiff's ex-wife and children resided. Complaint at ¶¶ 5, 10, and Exhibit "B". The Plaintiff helped pay the legal fees associated with the London litigation, although the ex-wife ultimately did not prevail. Complaint at ¶¶ 6-7. Pursuant to the laws of England, Plaintiff's ex-wife was ordered to pay Locabail's attorneys fees and costs, and Locabail then sought an order requiring the Plaintiff to pay those fees and costs as well. Complaint at ¶¶ 7-10. Locabail has not yet applied for, and the London court has not yet established, the amount of the fees and costs which are recoverable.

Plaintiff contends that the London cost judgment is unenforceable against him, and therefore requests that this Court enter a declaratory judgment to that effect. Complaint at ¶¶12-13. Plaintiff fails to

allege, however, that BNP has any interest, either direct or indirect, in the underlying London litigation, or the resulting order for entitlement to the legal fees and costs. Plaintiff's one and only effort to show BNP has some connection to this matter, or to the underlying cause, is the vague and conclusory allegation that:

> Defendants [BNP and Locabail] are interrelated parent and subsidiary companies with overlapping officers, directors, employees, and business interests, such that they constitute one legal entity. Upon information and belief all conduct of LOCABAIL relevant to this action was authorized, sanctioned, and orchestrated or directed by BNP.

Complaint at ¶ 4.

Plaintiff does not allege any facts to establish that BNP and Locabail are one legal entity for the purposes of this case or any other. Likewise, Plaintiff does not allege any facts to establish how BNP "authorized, sanctioned, and orchestrated or directed" Locabail's conduct with respect to the London litigation or this lawsuit. In fact, Plaintiff noticeably omits from his Complaint that BNP only acquired an indirect interest in Locabail in August 1999, approximately three years after the London litigation arose. The strategy of Plaintiff to acquire service of process and in personam jurisdiction over BNP and Locabail by conclusory allegations of BNP's control over Locabail, without more, should not be given audience by this Court. The Complaint should be dismissed as to BNP.

MEMORANDUM OF LAW

The Complaint against BNP should be dismissed pursuant to Rules 12(b)(1) and (b)(6), Federal Rules of Civil Procedure, because a justiciable controversy does not exist between the parties. Even if a justiciable controversy exists, numerous factors militate against the Court's exercise of its discretionary declaratory relief jurisdiction.

1. The District Court Should Dismiss Plaintiff's Action Where The Alleged Facts Fail To Establish An "Actual Controversy"

Plaintiff's Complaint seeks declaratory relief to the effect that the cost judgment entered by the London court is not enforceable against him. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02(2000), "permits federal courts to declare the rights of parties *only* in cases involving an 'actual controversy.'" Hendrix v. Poonai, 662 F.2d 719, 721 (11th Cir. 1981) (emphasis added). Consequently, the "threshold question in an action for declaratory relief must be whether a justiciable controversy exists." United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 747 (11th Cir. 1991).[1]

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[1] Whether a claim for declaratory relief in a diversity action may be heard in federal court is a federal matter to be resolved by federal law, whether the case is originally filed in federal court or removed by the defendant. See Moore's Federal Practice §57.04 and cases cited therin.

Although the existence of a justiciable controversy "is determined on a case-by-case basis,"[2] the following prerequisites must, at a minimum, be satisfied:

> [U]nder the facts alleged, there must be a substantial continuing controversy **between parties having adverse legal interests**. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. **Additionally, the continuing controversy may not be conjectural, hypothetical or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury**. The remote possibility that a future injury may happen is not sufficient to satisfy the "actual controversy" requirement for declaratory judgments.

Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985) (emphasis added); see also Malowey v. Federal Collection Deposit Group, 193 F.3d 1342, 1347 (11th Cir. 1999) (recent 11th Circuit case relying on Emory v. Peeler, to find plaintiffs could not state a claim for declaratory relief absent "actual controversy"); accord Public Serv. Comm'n v. Wycoff Co., 344 U.S. at 242-43, 73 S. Ct. at 240.

BNP's motion should be granted because BNP and Plaintiff have no adverse legal interests. Malowney, 193 F.3d at 1347; Emory, 756 F.2d at 1552.

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2 United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 747 (11th Cir. 1991).

Although Plaintiff has alleged that BNP and Locabail are one legal entity based on the existence of overlapping officers, directors, employees and business interests, and that ". . . all conduct of LOCABAIL relevant to this action was authorized, sanctioned, and orchestrated or directed by BNP." (Complaint at ¶4), these allegations are vague and conclusory, L.S.T., Inc. v. Crow, 49 F.3d 679, 684 (11th Cir. 1995) ("vague charges" or allegations of plaintiff unacceptable to court), are not admitted as true on a Rule 12(b)(6) motion to dismiss, Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974) (conclusory allegations and factual deductions not admitted as true), and are, therefore, insufficient to state a claim for relief, L.S.T., Inc., 49 F.3d at 684; Associated Builders, Inc., 505 F.2d at 100, accord, Aquatherm Indus., Inc. v. Florida Power & Light Co., 145 F.3d 1258, 1261 (11th Cir. 1998).

Should this Court look beyond the conclusory allegations of Plaintiff's Complaint, the motion should still be granted because the facts established by the documents attached to Plaintiff's Compliant, and the Affidavit of Stuart Fitzpatrick, Esq. ("Fitzpatrick Aff.) submitted with Locabail's contemporaneously filed motion, all contradict Plaintiff's vague and conclusory allegations in Paragraph 4.[3] Associated Builders, Inc., 505 F.2d at 100 (no claim for relief where documents attached to complaint contradict vague, conclusory allegations therein).

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[3] BNP has alternatively moved for a summary judgment if the Court needs to consider matters outside of the Complaint to reach the necessary result. See, infra Section III and Green v. Forney Engineering Co., 589 F.2d 243, 246-47 (5th Cir. 1979)..

Specifically, Exhibits A and B to Plaintiff's Complaint,[4] and the Fitzpatrick Affidavit, contradict Plaintiff's conclusory allegations that BNP and Locabail are one legal entity, and that BNP controlled Locabail's execution of the London litigation. The exhibits demonstrate that Locabail is a separate legal entity not under the control of BNP. The correspondence attached to the Complaint does not involve, much less show, that BNP is an interested party. (Compliant, Exhibits A and B). The London cost judgment does not name BNP as a party. (Complaint, Exhibit B). Likewise, neither Plaintiff or Plaintiff's ex-wife sought to have BNP joined as a necessary third party-defendant in the former litigation after Plaintiff's ex-wife's intervention, despite Plaintiff's allegations that the two defendants were in fact one entity. Furthermore, Fitzpatrick's Affidavit attests that BNP and Locabail "have no common dealing," and that they "do not share offices, directors, employees, or business interests, and cannot be said to constitute a single legal entity." (Fitzpatrick Aff., ¶¶2, 3).

This same analysis addresses Plaintiff's second conclusory allegation that BNP "authorized, sanctioned, and orchestrated or directed" Locabail with respect to "all conduct . . . relevant to this action." Plaintiff can plead no set of facts to establish his claim. Plaintiff's exhibits noticeably omit any correspondence referencing BNP either as the subject matter thereof or the sending or receiving party. (Complaint, Exhibits A

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4 Documents appended to the complaint are treated as part of the complaint for all purposes, and if those documents reveal facts which foreclose recovery as a matter of law, dismissal under Rule 12(b)(6) is proper. Associated Builders, Inc., 505 F.2d at 100; Fed. R. Civ. P. 10(c) and 12(b)(6)..

and B). Furthermore, BNP could not be the instigator behind the London litigation because BNP did not acquire an indirect interest in Locabail until August 1999, approximately three to four years after the London litigation commenced. (Fitzpatrick Aff., ¶2). Fitzpatrick's Affidavit attests that Locabail is only distantly affiliated with BNP as a result of a *hostile* takeover by BNP of a company that had remote interests in Locabail. (Fitzpatrick Aff., ¶2).

The allegations and exhibits in the Complaint, as well as the facts as set forth in Fitzpatrick's Affidavit, demonstrate that BNP has no adverse legal interest in this action or the underlying litigation to support BNP's presence in this case, or to support a claim against BNP. Absent adverse legal interest between BNP and the Plaintiff, Plaintiff can plead no set of facts to establish an "actual controversy" as required by the Declaratory Judgment Act.[5] This Compliant should be dismissed with prejudice under Rules 12(b)(1) and 12(b)(6).

II. Even If There Were An Actual Controversy, The Court Should Decline To Exercise Its Discretionary Declaratory-Relief Jurisdiction.

The Federal Declaratory Judgment Act is an enabling act that confers discretion on the courts rather than an absolute right upon the litigant. Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 241, 73 S. Ct. 236, 239 (1952); accord Lutsky v. Lutsky, 310 F. Supp. 517,

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[5] Dismissal without prejudice is appropriate where plaintiff can plead no set of facts showing that plaintiff is entitled to relief. Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991); cf. U.S. Fire Ins. v. Caulkins Indiantown Citrus, 931 F.2d 744, 747 (11th Cir. 1991).

520 (S.D. Fla. 1970). Whether to grant declaratory relief is within the courts sound discretion. Angora Enters. v. Condominium Ass'n of Lakeside Village, Inc., 796 F.2d 384, 387 (11th Cir. 1986).

A federal district court should decline to entertain a claim for declaratory relief: (1) when granting the relief sought would result in piecemeal litigation rather than termination of the controversy. Allstate Ins. Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990); Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co., 675 F.2d 610, 611 (4th Cir. 1982); (2) when the declaratory action would serve no useful purpose in clarifying the legal relations in issue, Allstate Ins. Co. v. Mercier, 913 F.2d at 277; (3) when the declaratory relief sought is a determination of the sufficiency of a defense that could be asserted in a potential or existing lawsuit, Public Serv. Comm'n v. Wycoff Co., 344 U.S. 248-49, 73 S. Ct. at 242-43 (1952); (4) when the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata," Allstate Ins. Co. v. Mercier, 913 F.2d at 277; or (5) when a better or more effective alternate remedy exists, Id.

A. Any Alleged Controversy Between BNP and the Plaintiff Is Not "Real and Immediate."

Assuming the Court finds that the Complaint sufficiently alleges that Plaintiff and BNP have adverse legal interest, this Court should, nonetheless, decline to exercise its jurisdiction over Plaintiff's declaratory judgment action because there is no "real and immediate" controversy between BNP and Plaintiff.

Angora Enters., 796 F.2d at 387 (whether to grant declaratory relief within court's sound discretion); Malowney, 193 F.3d at 1347 ("continuing controversy may not be conjectural, hypothetical or contingent; it must be real and immediate, and create a definite rather than speculate threat of future injury") Emory, 756 F.2d at 1552 (same).

By Plaintiff's own admission, the potential harm which underlies his claim for declaratory relief is based solely on a hypothetical contingency; *if* the London court establishes a judgment amount that Locabail decides to pursue in collection, and *if* Locabail determines that it will pursue that judgment against Plaintiff as opposed to Plaintiff's ex-wife, and *if* Locabail decides to bring that judgment to Florida to domesticate and enforce rather than someplace else, *then* Plaintiff should not be held liable for said judgment. The courts have repeatedly upheld the dismissal of such conjectural, hypothetical and contingent controversies. See, e.g., Wendy's Int'l Inc. v. City of Birmingham, 868 F.2d 433, 436 (11th Cir. 1989) ("Under these circumstances, the threat of condemnation simply is too attenuated to stir up an actual controversy. As it is, absent allegations pointing to a cognizable taking or the palpable threat of such, the appellant's suit necessarily is based upon the possibility of an occurrence which may never come to pass. Thus, there is as yet no controversy here ripe for adjudication."); Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981) ("the appellants are seeking a declaration that *if* they deny appellee's readmission application, and *if* the appellee subsequently brings an antitrust action based on that denial, then the appellants will be protected from liability by virtue of

the Parker v. Brown and Noerr-Pennington doctrines. We believe that a declaration to this effect would constitute an impermissible 'opinion advising what the law would be upon a hypothetical state of facts' . . . '[t]here [can] be no judicial determination that a valid defense exist[s] to a non-existent cause of action.'").

In the present case, Plaintiff supports his entire theory for declaratory relief on the bare allegation that Defendants "have expressed their intention to enforce [the judgment]" from the Chancery Division in London. Compliant at ¶ 11. Of course, the London court has not even established the amount of that judgment at this time. Fitzpatrick Aff., ¶ 7. Any intent by Locabail to domesticate the judgment obtained in London in the United States at some undetermined time in the future is *not* enough to create a real and immediate controversy within the meaning of the Federal Declaratory Judgment Act. 28 U.S.C. § 2201; see Malowney, 193 F.3d at 1347 ("[t]here must be a substantial likelihood that the plaintiff will suffer future injury; a 'perhaps' or 'maybe' chance is not enough"); Emory, 756 F.2d at 1552 (same).

Plaintiff, therefore, seeks an advisory opinion about an alleged controversy that Plaintiff's own allegations reveal cannot exist unless and until the London cost judgment is finalized, and Locabail decides to domesticate and enforce in Florida. Under these circumstances, the Court should decline to entertain Plaintiff's claim for declaratory relief.

B. Plaintiff's Claim Improperly Attempts to Determine the Sufficiency of Defenses to the Foreign Court's Judgment.

The Court should decline to hear Plaintiff's declaratory action because Plaintiffs' claim improperly attempts to anticipate defenses that would be asserted in a separate potential lawsuit by Locabail to enforce the London cost judgment. The court has explicitly stated that "[t]there [can] be no judicial determination that a valid defense exist[s] to a non-existent cause of action.'" Hendrix, 662 F.2d at 722; see also Allstate Ins. Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990) (court should decline to entertain declaratory judgment claim when granting relief sought would result in piecemeal litigation rather than termination of the controversy); Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co., 675 F.2d 610, 611 (4th Cir. 1982) (same); cf. Great Lakes Dredge and Dock Co. v. Ebanks, 870 F. Supp. 1112, 1117-18 (S.D. Ga. 19994) (court must consider "whether the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping" in determining whether to exercise jurisdiction over such complaint).

What Plaintiff asserts here is nothing more than a defense to an application for recognition of a foreign judgment in accordance with § 55.604 et seq. Fla. Stat. (1999). This Court should decline to offer an opinion on possible defenses to a non-existent state action. See Postscript Enterprise, Inc. v. Westfall, 711 F.2d 1132, 1137 (8th Cir. 1985) (it is not the function of a federal declaratory action merely to anticipate a defense that would otherwise be presented in a state action).

C. Plaintiff's Complaint is a Race to the Courthouse and a More Effective Remedy Exists.

Plaintiff is merely attempting to beat Locabail to the courthouse steps by filing a declaratory judgment action that essentially asserts only Plaintiff's defenses to a future potential state action by Locabail. Plaintiff alleges that he received letters indicating Locabail's "intent to enforce the judgment as against Plaintiff." Complaint at ¶¶ 11, 13. With no more information than that, Plaintiff files his action in Florida for declaratory relief to the effect that the same judgment is no enforceable against Plaintiff. The Court should decline to exercise its jurisdiction because the Plaintiff is forum shopping.

The district court in Great Lakes Dredge and Dock, supra using analysis from the Eleventh Circuit, determined that plaintiff's declaratory judgment action must be dismissed where the plaintiff simply attempted to assert a defense in the form of a declaratory complaint. Id. at 1119. In that case, Great Lakes received a letter from an injured seaman's attorney rejecting the latest settlement offer. Id. at 1118. Two days later, Great Lakes filed its declaratory judgment action. Although this case is not controlling in this Court, the analysis is persuasive because it supports the theory that "[t]he federal declaratory judgment is not a prize to the winner of a race to the courthouses . . . ." Great Lakes Dredge and Dock, 870 F. Supp. at 1118 (citing Perez v. Ledesma, 401 U.S. 82, 119 n. 12 (1971)).

If Locabail decides to enforce its London cost judgment once an amount is established against Plaintiff in Florida, Locabail must bring the judgment to a court within the state. At that point, Plaintiff will have ample opportunity to object under § 55.604 Fla. Stat. (1999) and to assert specific grounds for non-recognition or non-enforceability of the judgment under the statute. An adequate alternative remedy exists and Plaintiff's Complaint is the type of "procedural fencing" or "race for res judicia" for which declaratory relief is not appropriate. See Allstate Inc. Co., 913 F.2d at 277; see also Wright, Miller & Kane, Federal Practice and Procedure, Civil 3d § 2758.

III. Alternatively, Summary Judgment Should Be Granted Where There Are No Genuine Issues Of Material Fact As To BNP.

A motion to dismiss based on Rule 12(b)(6) may be converted into a motion for summary judgment, pursuant to Rule 56, where matters outside the pleading are considered. Green v. Forney Engineering Co., 589 F.2d 243, 246-47 (5th Cir. 1979) (citing 2A Moore's Federal Practice § 12.09); cf. Galindo v. Ari Mutual Ins. Co., 203 F.3d 771, 773-74 (11th Cir. 2000) (court considered defendants' 12(b)(6) motion to dismiss, and alternatively defendants' motion for summary judgment); L.S.T., Inc., 49 F.3d at 682 (same). The Court should grant BNP's alternative motion for summary judgment because the pleadings together with the Fitzpatrick Affidavit show that there is no genuine issue of fact and that BNP is entitled to judgment as a matter of law. Green, 589 F.2d at 247.

In the present case, BNP has no adverse legal interest in either the London litigation or this case. BNP is only distantly affiliated with Locabail, Fitzpatrick Aff. ¶ 2, and any interest BNP may have in Locabail came about approximately three years after the commencement of the underlying London litigation. Fitzpatrick Aff., ¶ 2. The remainder of Fitzpatrick's Affidavit demonstrates that any potential judgment against Plaintiff is sought by Locabail alone, and if the London cost judgment is ever enforced in Florida, Locabail, not BNP, will be attempting to pursue that judgment. Fitzpatrick Aff., ¶¶ 2-7.

CONCLUSION

BNP's motion to dismiss should be granted with prejudice. To the extent that the Court is required to go beyond the Complaint to reach this result, BNP is entitled to summary judgment under Rule 56.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Plaintiff's Complaint and Supporting Memorandum of Law was served via U.S. mail this 21st day of June, 2000 on:

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By: /s/John W. Little, III, P.A.
John W. Little, III, P.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 00-8461 CIV-RYSKAMP

PETER TAVOULAREAS,
Plaintiff,

v.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, LOCABAIL (UK) LIMITED ("LOCABAIL"), by and through its undersigned counsel, and for this its Motion to Dismiss Plaintiff's Complaint, or Alternative Motion for Summary Judgment, requests that this Court dismiss the Plaintiff's Complaint with prejudice on the grounds that this Court does not have jurisdiction over the Plaintiff's claim under 28 U.S.C. §2201, Fed. R. Civ. P. 57, and U.S.C. Const. Art. 3, §1 *et seq.*; this Court should exercise its discretion to decline to allow this action for declaratory judgment in accordance with 28 U.S.C. §2201; this Court does not have personal jurisdiction over LOCABAIL pursuant to Fed. R. Civ. P. 12(b)(2), and under Fed. R. Civ. P. 4 and 12(b)(4) and (5), process is insufficient and was insufficiently served upon LOCABAIL; and under Fed. R. Civ. P. 12(b)(6), the

Plaintiff has failed to state a claim upon which relief may be granted. Alternatively, LOCABAIL requests that this motion be considered one for final summary judgment under Fed. R. Civ. P. 56, and grant final summary judgment in favor of LOCABAIL since there is no genuine issue of material fact and LOCABAIL is entitled to judgment as a matter of law.

BACKGROUND

1. On or about May 4, 2000, Plaintiff filed its Complaint in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida seeking a declaratory judgment with respect to the enforceability of a foreign judgment obtained by LOCABAIL against the Plaintiff, PETER TAVOULAREAS ("TAVOULAREAS").

2. The Summons issued for LOCABAIL states that the Sheriff is commanded to serve the Summons and Complaint on LOCABAIL "by serving its Registered Agent Ramon Hernandez" and gives an address for Mr. Hernandez in Miami, Florida. The Verified Return of Service reflects that Richard E. Largo delivered the Summons and Complaint to Ramon Hernandez *"as Registered Agent of the within named corporation"*, namely LOCABAIL, on May 4, 2000 at 3:15 p.m. A certified copy of the Verified Return of Service with respect to LOCABAIL is attached hereto and incorporated herein as Exhibit "A". Ramon Hernandez is not and has never been the Registered Agent of LOCABAIL, as declared by Stuart Fitzpatrick in paragraph 3 of the Sworn Statement ("Statement") of Stuart Fitzpatrick, in support of LOCABAIL's motion. A true and correct copy of the Statement is attached hereto and incorporated herein as Exhibit "B"; the original will be filed upon receipt from Mr. Fitzpatrick.

3. Thereafter, on or about June 2, 2000, Defendant LOCABAIL filed Notice of Removal on the basis of diversity jurisdiction, removing this action to the United States District Court for the Southern District of Florida (West Palm Beach Division). LOCABAIL expressly reserved all available defenses in its Notice of Removal.

4. As was alleged in the Complaint, and confirmed in the Statement of Stuart Fitzpatrick, English counsel for LOCABAIL, in the prior proceedings LOCABAIL obtained a judgment[1] on a costs application against TAVOULAREAS in the High Court of Justice, Chancery Division, London, England, on December 20, 1999. [Complaint ¶10; Statement ¶6.]

5. Plaintiff acknowledges having notice and an opportunity to appear in and to defend the action in London, England. [Complaint ¶9.] Indeed, Mr. Fitzpatrick made every effort to inform TAVOULAREAS of the nature of the proceedings against him, of the hearings, and of the outcome of the hearings. [Statement ¶6.] Nevertheless, Plaintiff chose not to enter an appearance or to challenge or defend the suite against him in London, England. [Complaint ¶10]

6. This judgment has not been reduced to a sum certain, and a hearing on the amount of the costs to be awarded LOCABAIL has not yet taken place in London, England. [Statement ¶7.] Furthermore, LOCABAIL has yet to take steps to enforce its judgment against TAVOULAREAS either in England or in Florida. [Statement ¶7.]

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1 A copy of the judgment is believed to be attached to Exhibit "B" of the Complaint.

7. The Complaint purports to state a claim for declaratory relief pursuant to Florida's Declaratory Judgment Act, Fla. Stat. Ch. 86. [Complaint ¶1] Plaintiff falsely alleges that LOCABAIL is authorized to and conducts business in Florida. [Complaint ¶1} Plaintiff falsely alleges that LOCABAIL is authorized to and conducts business in Florida. [Complaint ¶3; *but see* Statement ¶3.] Additionally, Plaintiff falsely alleges, in vague and conclusory fashion, that LOCABAIL and co-defendant Banque Nationale de Paris ("BNP") are "interrelated parent and subsidiary companies with overlapping officers, directors, employees, and business interests, such that they constitute one legal entity." [Complaint ¶4, *but see* Statement ¶2, ¶3.]

8. As grounds for the Plaintiff's claim, Plaintiff asserts what are nothing more than defenses to an application for recognition of a foreign judgment in accordance with Fla. Stat. §55.604 (1999). [Complaint ¶12.] *See* Fla. Stat. §55.605 (1999), entitled "Grounds for nonrecognition."

9. The Plaintiff's Complaint must be dismissed for several reasons: (1) the Court has no jurisdiction because, pursuant to 28 U.S.C. §2201 (1993), Fed. R. Civ. P. 57, 12(b)(1) and 12(b)(6), there is no actual controversy or justifiable issue to be determined by the Court and the matter is not yet ripe as required by U.S.C. Const. Art. 3, §1 *et seq.*, and Plaintiff has failed to state a claim upon which relief may be granted and can plead no facts which would allow him to maintain a claim; (2) PURSUANT TO 28 U.S.C. §2201 (1993) and Fed.R.Civ. P. 57, the Court should exercise its discretion to decline to allow the Plaintiff's action seeking declaratory relief; (3) pursuant to Fed. R. Civ. P. 12(b)(2), the Court has no personal

jurisdiction over LOCABAIL because LOCABAIL is a foreign entity, not registered or conducting business in the State of Florida and does not have sufficient minimum contacts with the state of Florida; and (4) pursuant to Fed. R. Civ. P. 12(b)(4) and (5), LOCABAIL has not been served with process in accordance with Fed.R.Civ. P. 4 as the person served Ramon Hernandez is not authorized to receive process on behalf of LOCABAIL, and hereby moves to quash the return of service of process, and such process as was issued is insufficient.

10. Alternatively, LOCABAIL requests that this motion be considered one for final summary judgment under Fed. R. Civ. P. 56, and LOCABAIL moves for entry of a final summary judgment in its favor because there are no genuine issues of material fact.

MEMORANDUM OF LAW

I. PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER THE FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. §2201

The Plaintiff's Complaint purports to state a claim for a declaratory judgment regarding the enforceability of a foreign judgment entered against him in London, England. [Complaint ¶13.] Since Plaintiff's claim was originally brought in Florida state court, it invokes the jurisdiction of the Florida state court under Fla. Stat. §86.011 *et seq.*

(1999)[2] [Complaint ¶1.] However, LOCABAIL removed this action to federal court under 28 U.S.C. §1441 and invoked the diversity jurisdiction of this Court under 28 U.S.C. §1332. Therefore, the federal Declaratory Judgment Act, 28 U.S.C. §2201, is the procedural statute under which this Court must determine whether to exercise its jurisdiction to hear a suit for declaratory relief. Aetna Life Ins. Co. v. Haworth et al., 300 U.S. 227, 239 (1937), *reh'g. denied,* 300 U.S. 687 (1937); GTE Directories Publishing Corp. v. Trimen America, Inc., 67 F.3d. 1563, 1567 (11th Cir. 1995).

The Act states, in pertinent part, as follows:

> In a case of *actual controversy* within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may declare* the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. (Emphasis added).

28 U.S.C. § 2201. The Act requires that the case involve an "actual controversy", that the matter be "within its jurisdiction", and then expressly allows the courts discretion with respect to affording the interested party

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[2] Under the Florida Statute governing declaratory judgments, a court "may render declaratory judgments on the existence, or nonexistence: (1) of any immunity, power, privilege, or right; or (2) of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future." Fla. Stat. §86.011 (1999).

declaratory relief. *See* Wilton v. Seven Falls Co., 515 U.S. 277, 282-83 and 287 (1995). As such, this is an enabling act, conferring discretion on the courts and it does not confer an absolute right to a declaratory judgment on a litigant. Id. at 287, citing Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952); *accord* Lutsky v. Lutsky, 310 F.Supp. 517, 520 (S.D. Fla. 1970); Angora Enters. V. Condominium Ass'n of Lakeside Village, Inc., 796 F.2d 384, 387 (11th Cir. 1986).

A. The Plaintiff Cannot Establish An Actual, Real or Immediate Controversy To Invoke the Jurisdiction of This Court.

The preliminary inquiry is whether an actual case or controversy exists in the constitutional sense. U.S.C. Const. Art. 3 §I *et seq;* 28 U.S.C. §2201; Aetna, 300 U.S. at 239; GTE, 67 F.3d at 1567, *citing* Wendy's Intern., Inc. v. City of Birmingham, 868 F.2d 433, 435 (11th Cir. 1989). This determination is made on a case-by-case basis. GTE 67 F.3d at 1567; Hendrix v. Poonai, 662 F.2d 719, 721-22 (11th Cir. 1981). A controversy must be justiciable, rather than hypothetical or abstract, academic or moot. Aetna, 300 U.S. at 239.

There is no precise test to determine if a matter is an "actual controversy" as contemplated by the Declaratory Judgment Act. GTE, 67 F.3d at 1567, citing Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). However, courts will look for a showing of a substantial controversy, between parties with adverse legal interests, which is sufficiently real, definite and immediate to justify the declaratory relief sought. Id.; *see also* Aetna, 300 U.S. at 239 ("the controversy must be definite and concrete"; "it must be

a real and substantial controversy...as distinguished from an opinion advising what the law would be upon a hypothetical state of facts); Malowney v. Federal Collection Deposit Group, 193 F.3d 1342, 1347 (11th Cir. 1999) ("continuing controversy may not be conjectural, hypothetical or contingent; it must be real and immediate, and crate a definite, rather than speculative threat of future injury).

The circumstances of the instant case do not rise to the level of a showing of actual case or controversy sufficient to invoke the jurisdiction of the Court under 28 U.S.C. §2201. The "controversy" articulated in the Complaint relates to the enforceability of a costs judgment entered against TAVOULAREAS in London, England, not yet reduced to a sum certain and therefore, not final or enforceable at the present time. [Complaint ¶13; Statement ¶7.] As such, the "controversy" is hypothetical, premature, and not sufficiently "real and immediate" to justify the relief sought by TAVOULAREAS from this Court. Aetna 300 U.S. 227.

Rather than Plaintiff's grounds for requesting a declaratory judgment rest on multiple layers of contingencies which serve to defeat the reality or immediacy of the purported controversy. *See* Malowney, 193 F.3d 1342; Emory v. Peeler, 756 F.2d 1547 (11th Cir. 1985). It is possible that the London court may determine an amount far less than anticipated by LOCABAIL, which would present LOCABAIL with an issue of whether to proceed with enforcement against TAVOULAREAS in a foreign jurisdiction (i.e. Florida), at some considerable cost to LOCABAIL. Furthermore, LOCABAIL has other recourse available to it in that it also has obtained a cost judgment against Barbara Emmanuel, TAVOULAREAS's ex-wife. Once this

judgment is reduced to a sum certain, and the requisite certificate of amount is issued, it will be enforceable in England. A true and correct copy of the Order awarding Mrs. Emmanuel to pay LOCABAIL's costs, entered on March 29, 1999, is attached hereto and incorporated herein as Exhibit "C" and LOCABAIL requests that this Court take judicial notice of the same in accordance with Fla. Stat. § 90. 203 and §204.

Given all of these contingencies and possibilities, this declaratory judgment action brought by the Plaintiff is premature and anticipatory. It simply creates needless litigation, in anticipation of a purely hypothetical chain of events which may never occur, and which is no more than a transparent attempt to elicit an advisory opinion from this Court. In short, there is no "actual controversy" before this Court, and Plaintiff cannot maintain its action for declaratory judgment based on nothing more than an attenuated supposition of what may happen, rather than a real and immediate controversy threatening injury to the Plaintiff.

It is important to note that the Plaintiff will not be without a remedy by this Court's denial of jurisdiction. If LOCABAIL does obtain an award which it chooses to enforce against TAVOULAREAS in Florida, then LOCABAIL is obliged to comply with Fla. Stat. §55.601 *et seq.*, Florida's Uniform Foreign Money-Judgment Recognition Act. At the present time, LOCABAIL cannot invoke the powers of this Act because it does not have a "money-judgment" which is final, conclusive and enforceable where rendered. Fla. Stat. §55.603. Once the London court determines a final amount, under English law the court will issue a certificate stating the amount, and this will constitute the final and enforceable judgment. If LOCABAIL

decides to pursue enforcement of this judgment in Florida against TAVOULAREAS, then TAVOULAREAS will have ample opportunity to object under Fla. Stat. §55.604, and to bring to the attention of the court hearing the objection the specific grounds for non-recognition or nonenforceability of the judgment under the Act. Fla. Stat. §55.604 and §55.605. However, until the certificate is issued by the London court, there is no judgment upon which LOCABAIL could rely to demand payment of any sum from TAVOULAREAS. Hence, there is no "actual controversy" between these two parties and the Plaintiff's claim should be dismissed with prejudice.

B. This Court Should Decline to Exercise Its Discretion To Adjudicate The Plaintiff's Premature, Anticipatory and Improper Declaratory Judgment Claim Where The Plaintiff Has An Alternate And Better Remedy And The Inconvenience And Burden On The Defendant Would Be Inequitable.

If this Court determines that there exists an actual controversy between the parties,[3] the Court must next conduct an inquiry into the propriety of declaratory relief in the instant case to determine

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[3] There is an intermediate step to the inquiry, i.e. whether there exists an independent basis for federal court jurisdiction, which has been satisfied in the instant case which is one of diversity of citizenship with an amount in controversy in excess of the jurisdictional amount set forth in 28 U.S.C. § 1332. *See* Wright, Miller & Kane Federal Practice and Procedure: Civil 3d §2766; Sworn Statement of Stuart Fitzpatrick filed in support of LOCABAIL's Notice of Removal.

whether to exercise its discretion and decline to allow the Plaintiff to maintain his claim for declaratory relief. *See* Wilton, 515 U.S. at 286. Given the facts and circumstances before the Court, the Court should exercise its discretion and decline to allow the Plaintiff's claim for declaratory judgment.

The U.S. Supreme Court stated in Wilton that the assumption of jurisdiction by a federal court to hear a declaratory judgment action is neither automatic nor obligatory. Wilton, 515 U.S. at 288, *citing* Borchard, Declaratory Judgments, 313 (2d ed. 1941). The Court wrote: "[b]y the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." Wilton, 515 U.S. at 288.

Where an alternative remedy is better and more effective than the declaratory relief sought, the courts have declined to exercise discretion to hear a declaratory judgment action. *See e.g.* Cartier v. Secretary of State, 506 F.2d 191 (D.D.C. 1974), *cert. den.* 421 U.S. 947; Hickmann v. Wujick, 488 F.2d 875 (2d Cir. 1973); Dawson v. Department of Transportation, 480 F.Supp. 351 (W.D. Okla. 1979); MacMillan-Bloedel, Inc. v. Firemen's Ins. Co. of Newark, New Jersey, 558 F.Supp. 596 (S.D. Ala. 1983).

The Florida legislature has expressly provided for the statutory procedure to be followed to recognize and enforce a foreign judgment. Fla. Stat. §55.601 *et seq.* The first step is for the judgment creditor, LOCABAIL, to file and record the judgment in Florida. Fla. Stat. §55.604. The second step allows the judgment debtor, TAVOULAREAS, to object to the recognition or enforceability of the costs judgment. Fla. Stat. §55.604.

Under the second step, TAVOULAREAS may raise each and every objection set forth in paragraph 12 of the Complaint, and have a court determine the enforceability of the cost judgment. Fla. Stat. §55.605. Therefore, because the Florida statute establishes a procedure to collect foreign judgments, his Court should exercise its discretion to decline to allow TAVOULAREAS to preempt or circumvent the proper and established procedure.

Importantly, courts have declined to exercise discretion to hear declaratory judgment actions when the declaratory relief sought is a determination of the sufficiency of a defense that could be asserted in a potential or existing lawsuit. *See e.g.* Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. at 248-49 (1952); Postscript Enterprises, Inc. v. Westfall, 771 F.2d 1132, 1137 (8th Cir. 1985) (it is not the function of a federal declaratory action merely to anticipate a defense that otherwise could be presented in a state action). The Plaintiff has presented a thinly veiled attempt to do the very same. The allegations of paragraph 12 of the Complaint are all defenses available to be asserted as grounds for nonrecognition or nonenforceability of a foreign money-judgment under Fla. Stat. §55.605. This Court should not condone or collaborate in such an inappropriate action.

Indeed, the Plaintiff appears to be racing LOCABAIL to the courthouse, since a declaration by this Court of the enforceability of the costs judgment is *res judicata*. *See* Seaboard Coast Line r. Co. v. Gulf Oil Corp., 409 F.2d 879 (5th Cir. 1969). This tactic under the guise of an action for declaratory relief is frowned upon by the courts. *See* Allstate Inc. Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990) (mere "procedural fencing"

and "a race for *res judicata*" will not support the exercise of the court's discretion in an action for declaratory judgment).

In its allegations in paragraph 12, subsection 2, of the Complaint, the Plaintiff asks the Court to render a declaratory judgment with respect to whether the costs judgment is "repugnant to Florida law and violates Florida's public policy". The Court should refuse to decide matters of the State's public policy in a declaratory action. *See e.g.* Smith v. Metropolitan Property & Liability Ins. Co., 629 F.2d 757 (2d Cir. 1980); American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959).

Other factors considered by the courts in determining whether to render a declaratory judgment are the inconvenience and burden to litigants living at a distance from the forum in which the declaratory action is filed. *See e.g.* Republic Ins. Co. v. Sinclair Oil Corp., 791 F.Supp 278 (D. Utah 1992); Kozol v. Lumbermens Mut. Cas. Co., 201 F.Supp 718 (D. Mass 1962). In the matter before the court, it cannot be controverted that LOCABAIL is at a tremendous disadvantage, and faces considerable inconvenience, burden and expense to defend the declaratory judgment action filed by the Plaintiff since it operates its business in London, England. [Statement ¶2 and ¶3.] As the costs judgment, attached to the Complaint as exhibit "B" states, TAVOULAREAS used to reside in England, with his wife and children, maintained property in England and conducted business in England. [Exhibit "B" to Complaint, attachment, at ¶4.] Although it is unknown whether he maintains any contacts to England, it is well established that

LOCABAIL has no contacts to Florida. This factor should be considered by the Court in its determination of the equities.

A complaint must be dismissed for failure to state a claim when it appears beyond a doubt that the Plaintiff can prove no set of facts to support a claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991); *cf.* U.S. Fire Ins. v. Caulkins Indiantown Citrus, 931 F.2d 744, 747 (11th Cir. 1991). A court will construe as true the allegations of the complaint, when ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and take the allegations in the light most favorable to the Plaintiff. In the instant case, because there is no "actual controversy" the Court should not exercise its discretion to hear the Plaintiff's declaratory judgment action, and this Complaint must be dismissed with prejudice for failure to state a claim upon which relief may be granted. TAVOULAREAS cannot prove any set of facts to support an action for declaratory judgment under the present circumstances.

II. PLAINTIFF'S COMPLAINT MUST BE DISMISSED DUE TO LACK OF PERSONAL JURISDICTION OVER LOCABAIL, INSUFFICIENT PROCESS AND INSUFFICIENT SERVICE OF PROCESS.

This Court does not have jurisdiction over LOCABAIL because it is a company registered in England, governed by English law, and not licensed to do or doing business in Florida. [*See* Statement of Stuart Fitzpatrick.] LOCABAIL has no contacts with Florida; it does not have an office in Florida; it does not

have any directors, officers, agents, or employees in Florida; it is not registered to conduct business in Florida; nor has it appointed an agent to receive service of process in Florida. In sum, LOCABAIL has no presence in Florida. Additionally, LOCABAIL does not have any minimum contacts with Florida such that it can be hailed into a Florida court under Florida's long-arm jurisdiction statute.

The Plaintiff's Complaint must be dismissed because the process issued by the Clerk and prepared by the Plaintiff is improper. Additionally, the Plaintiff's Complaint must be dismissed, or in lieu thereof, the Verified Return of Service must be quashed, on the grounds that (a) LOCABAIL is a company registered in England, under English law, and was not and is not subject to service of process within Florida, and (b) that LOCABAIL has not been properly served with process in this action even if it could be served in Florida.

The Federal Rules of Civil Procedure apply to an action for declaratory judgment under 28 U.S.C. §2201 (1993). Fed. R. Civ. P. 57. Therefore, this Court must review both the process and the service of process for compliance with Fed. R. Civ. P. 4. In the instant action, the process is facially deficient because it incorrectly identifies LOCABAIL as having a Registered Agent, Ramon Hernandez, located in Miami, Florida and fails to state the address of the principal business offices of LOCABAIL in London, England.

TAVOULAREAS purportedly served LOCABAIL with the summons and Complaint in this matter by serving the registered agent of Banque Nationale de Paris, Ramon Hernandez, with process in the Miami branch office of BNP. TAVOULAREAS seeks

to rely on such service of process. [*See* Exhibit "A", attached hereto.] However, such service of process does not comport with Fed. R. Civ. P. 4(h) governing service upon corporations and associations. The rule provides that service upon a foreign corporation shall be effected:

> "(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to *an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process* and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or
>
> (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof." (Emphasis added.)

Fed. R. Civ. P. 4(h). Neither BNP nor Ramon Hernandez is an officer, managing or general agent or otherwise appointed as an agent of LOCABAIL. [*See* Statement ¶3.]

Furthermore, the Plaintiff is failed to comply with subdivision (e)(1) of the rule which states that service "may be effected in any judicial district of the United States pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general

jurisdiction of the State". Fed. R. Civ. P. 4(e)(1). This invokes the laws of Florida with respect to service of process, i.e. Fla. Stat. §48.011 *et seq.*

However, LOCABAIL does not fall within the parameters of Fla. Stat. §48.011 *et seq.* LOCABAIL is not, nor can it be considered to be, a Florida corporation or a foreign corporation qualified to transact business in Florida. [*See* Statement ¶3.] Therefore, LOCABAIL is a nonresident business entity which does not have a principal place of business in Florida. [*See* Statement ¶3.] Furthermore, LOCABAIL does not engage in business in Florida, or in the United States [Statement ¶3.] Indeed, LOCABAIL's business "was conducted from offices in London, England. It did not and does not conduct business in the United States, nor did it or does it maintain an office to conduct business in the United States." [Statement ¶3.]

Additionally, LOCABAIL did not and does not have an agent or any agents transacting business for it in the state of Florida. [Statement ¶3.] As stated by Mr. Fitzpatrick, "LOCABAIL is not registered to conduct business in the United States and has no registered agent in the United States." [Statement ¶3.] Finally, LOCABAIL does not have a registered agent in Florida, has not appointed Ramon Hernandez as Registered Agent for LOCABAIL, nor authorized him to accept service of process on behalf of LOCABAIL in Florida or other states in the United States. [Statement ¶3.]

Therefore, the only section of the Florida statutes which could apply to LOCABAIL would be §48.193, the long-arm statute, providing that LOCABAIL met the criteria set forth in the statute, which is denied. Indeed, a federal court in a diversity action is permitted to exercise personal jurisdiction over a non-resident

defendant only to the extent permitted by the long-arm statute of the forum state. Oriental Imports and Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 890 (11th Cir. 1983); *see also* Rabaii v. Lakewood Pipe of Texas, Inc., 695 F.2d 541 (11th Cir. 1983).

Federal courts are required to construe the Florida long-arm statute as would the Florida Supreme Court, because the reach of the statute is a question of Florida state law. Oriental Imports, 701 F.2d at 890-91; *see also* Moore v. Lindsey, 662 F.2d 354, 357-58 (5th Cir. Ga. 1981). Florida's long-arm statute is subject to strict construction, and the Plaintiff has the burden of proving facts which clearly justify the use of the statute's provisions for service of process. Oriental Imports 701 F.2d at 891. The Plaintiff has failed to meet this burden. Based on the vague and conclusory allegations of the Complaint, and the Summons, the Plaintiff did not invoke the Florida long-arm statute for valid service of process on LOCABAIL. [Complaint ¶3.]

Additionally, it is clear from the Statement of Mr. Fitzpatrick that LOCABAIL has not submitted itself to the jurisdiction of the courts of Florida because it has not performed any of the enumerated acts invoking jurisdiction. [Statement ¶3.] Additionally, LOCABAIL is not engaged in any activity, substantial or isolated, in Florida, or demanded any affirmative relief against the Plaintiff in a Florida court. [Statement ¶3.]

Since Florida courts of general jurisdiction cannot assert jurisdiction over LOCABAIL under these facts, the analysis returns to service of process in accordance with the Federal Rules of Civil procedure. A review of Fed. R. Civ. P. 4(f) reveals that TAVOULAREAS failed to obtain service of process over LOCABAIL as allowed under the rules, which must result in dismissal of

TAVOULAREAS's action against LOCABAIL. TAVOULAREAS did not serve the summons and complaint upon LOCABAIL in London, England.[4] [Statement ¶3.]

In the event that TAVOULAREAS's theory of jurisdiction over LOCABAIL rests on the allegation of LOCABAIL and BNP being "interrelated parent and subsidiary companies with overlapping officers, directors, employees, and business interests, such that they constitute one legal entity" and that "all conduct of LOCABAIL relevant to [the declaratory judgment] action was authorized, sanctioned, and orchestrated or directed by VNP", LOCABAIL respectfully states that TAVOULAREAS has misled the Court. [Complaint ¶4.] These allegations are completely erroneous factually. Furthermore, they are vague, conclusory and cannot be taken to be admitted as true in a motion to dismiss. South Florida Water Management District v. Montalvo, 84 F.3d 402 (11th Cir. 1996) (Footnote 10); Associated Builders Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).

Mr. Fitzpatrick explains in detail the relationship between LOCABAIL and BNP in paragraphs 2 and 3 of his Statement. He described the distant and attenuated financial and ownership interest which BNP acquired in LOCABAIL in August, 1999 as a result of the hostile take over by BNP of Group Paribas. [Statement ¶2.] LOCABAIL found itself to be a subsidiary of BNP on paper alone. [Statement ¶2 and 3.] All business

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[4] Since service was not effectuated at all, it is unnecessary to set forth an analysis of what would have constituted proper service of process under the Federal Rules of Civil Procedure, the Hague Convention on the Service Abroad of judicial and Extrajudicial Documents, or under English law.

operations remained separate, both geographically and financially. [Statement ¶3.] As stated so succinctly by Mr. Fitzpatrick, "the two companies have no common dealing". [Statement ¶3.] He goes on to greater detail, explaining that BNP exerts and exerted no control over LOCABAIL's business dealings and transactions, and that they have no common offices, directors, employees, or even business interests. [Statement ¶3.]

It is well established law in Florida that conclusory (and false) allegations of corporations being alter egos cannot suffice to pierce the corporate veil of the entities without a showing of improper conduct. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1121 (Fla. 1984). TAVOULAREAS has failed to meet this burden and is not entitled to a presumption of wrongdoing by BNP and/or LOCABAIL such that the two companies are alter egos of each other, and service of process on the registered agent of one would suffice as substituted on the other.

Valid service of process effectuated on one entity does not, by itself, constitute valid service of process on one of its sister companies. Aquila Steel Corp. v. Fontana, 585 So.2d 426 (Fla. 3d DCA 1991) ("the fact that the party actually served is the wholly-owned subsidiary of the party for whom service was intended does not support substituted service"). Substituted service of process will only be permitted where the Plaintiff demonstrates that the parent corporation exercises such a degree of control over the subsidiary that the activities of the subsidiary are in fact the activities of the parent within the state. Id., citing Volkswagenwerk Atkiengelselischaft v. McCurdy, 340 So.2d 544, 546 (Fla. 1st DCA 1976), cert. den. 348 So.2d 950 (Fla. 1977).

TAVOULAREAS has failed to demonstrate that LOCABAIL is so completely controlled by BNP that service of process on BNP (or its Registered Agent in Florida) can be deemed to be valid substituted service of process on LOCABAIL. In fact, TAVOULAREAS has offered only conclusory allegations, refuted by the Statement of Mr. Fitzpatrick, that BNP and LOCABAIL are sufficiently "overlapping" to "constitute one legal entity". [Complaint ¶4; Statement ¶2 and ¶3.] Without evidence that BNP and LOCABAIL are alter egos or that BNP completely controls LOCABAIL, the Plaintiff's service of process on LOCABAIL is deficient and the Complaint must be dismissed or the Verified Return of Service must be quashed. Aquila Steel, 585 So.2d at 427.

ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Alternatively, LOCABAIL moves the Court, pursuant to Fed. R. Civ. P. 56, to grant a final summary judgment[5] in favor of LOCABAIL dismissing with

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5 The legal standard to be applied to a motion for summary judgment under Fed. R. Civ. P. 56 is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of establishing the absence of a genuine issue of material fact rests with the movant. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the movant meets its burden, the burden of production shifts to the nonmoving party who may not rest upon the mere allegations or denials of the movant's pleadings, but must present specific facts showing that there is a genuine issue for trial. Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

prejudice the action brought by TAVOULAREAS. Green v. Forney Engineering, Co., 589 F.2d 243, 246-247 (5th Cir. 1979) citing 2A Moore's Federal Practice §12.09; *cf.* Galindo v. Ari Mutual Ins. Co., 203 F.3d 771, 773-74 (11th Cir. 2000) (court considered Rule 12(b)(6) motion to dismiss and alternatively motion for summary judgment). The pleadings together with the Statement of Mr. Fitzpatrick establish that there is no genuine issue of material fact, and that LOCABAIL is entitled to a judgment as a matter of law dismissing Plaintiff's Complaint. Green, 589 F.2d at 247. The Statement clearly evidences that LOCABAIL was not properly served with process in this action, and that the judgment is not final or enforceable, therefore, the matter is not ripe or justiciable where there is not real or immediate actual controversy between the parties to invoke the jurisdiction of the Court.

CONCLUSION

WHEREFORE, the Defendant LOCABAIL requests that its Motion to Dismiss Plaintiff's Complaint, or Alternative Motion for Summary Judgment be granted and that the Complaint be dismissed with prejudice, and for such other relief as the Court deems just and proper.

Respectfully submitted,

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Attorneys for Locabail (UK) Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21st day of June, 2000 to John W. Little, III, Steel Hector & Davis, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6161, counsel for BNP; and Rachelle R. McBride, Esquire, Sachs, Sax & Kelein, P.A., Northern Trust Plaza, Suite 4150, 301 Yamato Road, Boca Raton, Florida 33431, counsel for Tavoulareas.

/s/ S. Joanne Greer
S. Joanne Greer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

PETER TAVOULAREAS,
Plaintiff,

vs. CASE NO.

BANQUE NATIONALE DE PARIS and
LOCABAIL (UK) LIMITED,
Defendants.
_____/

NOTICE OF REMOVAL

COME NOW Defendant, LOCABAIL (UK) LTD., by and through their undersigned counsel, and enters a limited appearance to remove the above-styled cause from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. CL 00-4360 AH, in which it is now pending, to the United States District Court for the Southern District of Florida and in support thereof, Defendant would show unto the court as follows:

1. That the amount in controversy in this action exceeds the sum of $75,000.00 exclusive of interest and costs, as set forth in the Sworn Statement of Stuart Fitzpatrick, Esquire, a copy of which is attached hereto and incorporated herein as Exhibit "A" (the original Sworn Statement will be filed with this Court upon receipt from Mr. Fitzpatrick).

2. That Plaintiff, PETER TAVOULAREAS, is a resident of Palm Beach County, Florida, and is otherwise *sui juris*.

3. That Defendant LOCABAIL (UK) LTD. ("LOCABAIL") is a foreign company with its principal place of business in London, England, and with no offices or agents in Florida, and not conducting any business in Florida.

4. That Defendant BANQUE NATIONALE DE PARIS ("BNP") is a foreign company, specifically a French company. BNP has its principal place of business in Paris, France. BNP was not a party to the original action in England, and merely purchased LOCABAIL in September, 1999.

5. BNP has consented to removal of this action to federal court.

6. That Plaintiff has sued both Defendants seeking a declaratory

judgment determining that a judgment for costs in favor of LOCABAIL entered in London, England is not enforceable against Plaintiff.

7. That this action is within the diversity jurisdiction of this Court pursuant to 28 U.S.C § 1332.

8. That this Notice of Removal has been filed within 30 days after the filing of the Complaint and is therefore proper within the provisions of 28 U.S.C § 1441 and § 1446.

9. That Defendant has attached hereto copies of all pleadings on file in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. CL 00-4360 AH, which consists of the Complaint (Exhibit "B").

10. That LOCABAIL does not, nor does it intend to, waive any jurisdiction or other defenses to the Complaint filed by Plaintiff, including without limitation, defenses of lack of personal jurisdiction, insufficiency of process, insufficiency of service of process and/or failure to state a claim upon which relief can be granted.

Respectfully submitted,

_____

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IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. _____

PETER TAVOULAREAS

Plaintiff,

v.

WILLIAM TAVOULAREAS,

Defendant.

_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff, PETER TAVOULAREAS (hereinafter "PLAINTIFF"), hereby, through counsel, and sues Defendant WILLIAM TAVOULAREAS (hereinafter "DEFENDANT"), and alleges as follows:

1. This is an action for damages which exceeds $15,000, exclusive of costs and attorneys' fees.

2 Plaintiff, PETER TAVOULAREAS, is a resident of Palm Beach County, Florida and is otherwise *sui juris*.

3. Defendant, WILLIAM TAVOULAREAS, is a resident of Palm Beach County, Florida and is otherwise *sui juris*.

4.All of the acts giving rise to this Complaint occurred in Palm Beach County, Florida.

COUNT I - LIBEL PER SE

5. PLAINTIFF realleges and incorporates the allegations contained in Paragraphs 1-4 as if specifically incorporated herein.

6. On numerous occasions, DEFENDANT falsely represented in writing that he was PLAINTIFF in order to obtain various prescription drugs utilizing PLAINTIFF's name. The false representations were communicated to the Pharmacists and/or staff of several Pharmacies located in or near the City of Boca Raton, Florida.

7. The representations damaged the reputation of PLAINTIFF by falsely imputing, implying, or representing that PLAINTIFF has a disease, either mental or physical, which requires the medications obtained by DEFENDANT, or that PLAINTIFF habitually utilizes various controlled substances.

8. The false representations communicated by DEFENDANT cause PLAINTIFF to be subjected to distrust, contempt and disgrace, or impute a condition incompatible with the proper exercise of PLAINTIFFs lawful business, trade or occupation, thereby causing damage to PLAINTIFF's reputation.

WHEREFORE, Plaintiff, PETER TAVOULAREAS, demands judgment against Defendant, WILLIAM TAVOULAREAS for damages in excess of $15,000, costs and other such relief as the Court may deem appropriate.

COUNT II- SLANDER PER SE

9. PLAINTIFF realleges and incorporates the allegations contained in Paragraphs 1-4 as if specifically incorporated herein.

10. On numerous occasions, DEFENDANT falsely represented orally that he was PLAINTIFF in order to obtain various prescription drugs utilizing PLAINTIFF's name. The false representations were communicated to the Pharmacists and/or staff of several Pharmacies located in or near the City of Boca Raton, Florida.

11. The representations damaged the reputation of PLAINTIFF by imputing, implying, or representing falsely that PLAINTIFF has a disease, either mental or physical, which requires the medications obtained by DEFENDANT, or that PLAINTIFF habitually utilizes various controlled substances.

12. The false representations communicated by DEFENDANT cause PLAINTIFF to be subjected to distrust, contempt and disgrace, or impute a condition incompatible with the proper exercise of PLAINTIFF's lawful business, trade or occupation, thereby causing damage to PLAINTIFF's reputation.

WHEREFORE, Plaintiff, PETER TAVOULAREAS, demands judgment against Defendant, WILLIAM TAVOULAREAS for damages in excess of $15,000, costs and other such relief as the Court may deem appropriate.

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By: /s/ Rachelle R. McBride
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